No. 90-889 CFX Title: William "Sky" King, Petitioner
Status: GRANTED v.
St. Vincent's Hospital

Docketed: Court: United States Court of Appeals
December 5, 1990 for the Eleventh Circuit

See also: Counsel for petitioner: Solicitor General
89-1949

Counsel for respondent: Hopkins,Harry L.

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Entry	Date	Note	Proceedings and Orders
1	Nov 8 1990	G	Application (A90-354) to extend the time to file a petition for a writ of certiorari from November 19, 1990 to December 17, 1990, submitted to Justice Kennedy.
2	Nov 9 1990		Application (A90-354) granted by Justice Kennedy extending the time to file until December 17, 1990.
3	Dec 5 1990	G	Petition for writ of certiorari filed.
4	Jan 4 1991		Brief of respondent St. Vincent's Hospital in opposition filed.
5	Jan 9 1991		DISTRIBUTED. February 15, 1991
6	Jan 16 1991		REDISTRIBUTED. February 15, 1991
7	Jan 31 1991	X	Reply brief of petitioner William King filed.
8	Feb 19 1991		Petition GRANTED.
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9	Mar 1 1991	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
10	Mar 18 1991		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
11	Apr 5 1991		Brief of petitioner William "Sky" King filed.
12	May 8 1991		Brief of respondent St. Vincent's Hospital filed.
13	Jun 12 1991		Reply brief of petitioner William "Sky" King filed.
14	Jul 12 1991		CIRCULATED.
15	Jul 19 1991		SET FOR ARGUMENT WEDNESDAY, OCTOBER 16, 1991. (2ND CASE)
16	Aug 1 1991		Certified copy of original record on appeal and proceedings received. 3 volumes.
17	Oct 16 1991		ARGUED.

90-889

No.

In the Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM "SKY" KING, PETITIONER

v.

ST. VINCENT'S HOSPITAL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether an employee's right under 38 U.S.C. 2024(d) to a leave of absence from employment to serve in the Armed Forces of the United States is conditioned on the "reasonableness" of the employee's request for leave.

PARTIES TO THE PROCEEDING

The parties in the court of appeals were petitioner William "Sky" King, who is represented by the United States pursuant to 38 U.S.C. 2022, and St. Vincent's Hospital.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No ——

WILLIAM "SKY" KING, PETITIONER

v.

ST. VINCENT'S HOSPITAL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Solicitor General, on behalf of William "Sky" King, petitions for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 901 F.2d 1068. The opinion of the district court (App., *infra*, 13a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1990. A petition for rehearing was denied on August 21, 1990. App., *infra*, 24a. A suggestion for rehearing en banc was denied on August 29, 1990. App., *infra*, 25a-26a. On November 9, 1990, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including December 17, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

38 U.S.C. 2024(d) of the Veterans' Reemployment Rights Act provides, in pertinent part:

> Any employee not covered by [section 2024 (c)] who holds a position described in clause (A) or (B) of section 2021(a) shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training * * * such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes.

STATEMENT

1. In June 1987, William "Sky" King, a 35-year veteran of the Alabama National Guard, applied for the position of Command Sergeant Major, which is the highest position for an enlisted member of the state National Guard. The Command Sergeant Major, who assists and advises the Adjutant General[1] on personnel matters, serves in the Active Guard/Reserve (AGR) Program, App., *infra*, at 3a, 27a, which Congress created in 1980. See Department of Defense Authorization Act, 1980 (DOD Act), Pub. L. No. 96-107, Tit. IV, § 401(b), 93 Stat. 807. The AGR program authorizes members of the Military Reserves and the National Guard of the United States to serve

[1] The Adjutant Major is the commanding officer of the Alabama National Guard. See 32 U.S.C. 314(a). He is appointed by the Governor of Alabama.

full-time tours of duty for the purposes of "organizing, administering, recruiting, instructing, or training the reserve components." *Ibid.* Army regulations require AGR personnel to serve three-year tours of duty. Army Reg. 136-18, ch. 2, § II, at 2-9 (1985).

On July 18, the Alabama National Guard informed King that he had been selected for the position of Command Sergeant Major, and King accepted immediately. App., *infra*, at 3a-4a. King then notified his supervisor at St. Vincent's Hospital, where King was employed as manager of the security department, that he had accepted a three-year position with the Alabama National Guard. *Id.* at 4a. On August 7, the Guard told King that his duties would begin on August 17, and King began his tour of duty on that day. *Ibid.*

On September 8, 1987, after considering King's leave request, his employer notified him by letter that his request was denied. The letter stated that, in the employer's view, King did not qualify for leave under the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. 2021 *et seq.*, Chapter 43 of which is known as the Veterans' Reemployment Rights Act (VRRA or the Act), and that his request for such a lengthy period of leave was unreasonable. App., *infra*, at 5a.

2. The hospital filed a declaratory judgment action in the United States District Court for the District of Alabama to determine whether King was entitled under the VRRA to a leave of absence for the duration of his three-year tour of duty. The district court noted that King's orders fell within the scope of Section 2024(d).[2] App., *infra*, 18a & n.8. The court

[2] The court observed that King was ordered to duty under 32 U.S.C. 502(f), which provides, in pertinent part:

concluded that King's reemployment rights were governed by the latter section, which states, in pertinent part, that the employee

> shall upon request be granted a leave of absence by [his] employer for the period required to perform active duty for training * * * in the Armed Forces of the United States.

Applying the reasonableness test set forth in the Eleventh Circuit's decision in *Gulf States Paper Corp.* v. *Ingram*, 811 F.2d 1464, 1469 (1987),[3] the court

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Under regulations to be prescribed by the Secretary of the Army, * * * a member of the National Guard may

(1) without his consent, but with the pay and allowances provided by law; or

(2) with his consent, either with or without pay and allowances;

be ordered to perform training or other duty in addition to that prescribed under subsection (a). * * *

The court explained that, under 38 U.S.C. 2024(f), full-time duty performed by a National Guard member under Section 502 is considered "active duty for training" under Section 2024(d). App., *infra*, 18a n.8.

[3] In *Gulf States*, the court identified three factors to be taken into account in evaluating the reasonableness of a request for leave under 38 U.S.C. 2024(d): "the length of the leave, [the employee's] actions, and the burden upon [the employer] in filling [the] position during [the] absence." 811 F.2d at 1469.

The *Gulf States* court stated that the employee's request enjoys a presumption of reasonableness, that "burden on the employer alone is not enough" to defeat the presumption, and that "the weightiest factor in overcoming the presumption is the conduct of the employee." 811 F.2d at 1469. Only "conduct akin to bad faith on the employee's part" will lead to a finding of unreasonableness. *Ibid.* In a footnote, see *id.* at 1470 n.4, the court acknowledged that "bad faith conduct

determined that, apart from the length of the leave, King's conduct in requesting leave was not blameworthy. App., *infra*, 18a-21a. The court held, however, that a three-year leave request was *per se* unreasonable, and that King was therefore not entitled to reemployment rights under Section 2024(d). *Id.* at 21a-22a.

3. The court of appeals for the Eleventh Circuit affirmed, with Judge Roney concurring in part and in the result. The court relied heavily on its previous analysis in *Gulf States*. There, the court of appeals, although acknowledging that "the statute does not address the 'reasonableness' of a reservist's leave request," engrafted a "reasonableness" requirement onto Section 2024(d). App., *infra*, 7a. In the present case, the court of appeals reiterated the determination in *Gulf States* that the reasonableness of a request was dependent, in large part, on the reservist's conduct, and that a request for leave "of exceptional duration," App., *infra*, 8a, might amount to bad faith conduct justifying denial of leave. *Ibid.* The court described as "self-contradictory" the legislative history of Section 2024(d), and noted the Supreme Court's statement in *Monroe* v. *Standard Oil Co.*, 452 U.S. 549, 555 (1981), that Section 2024(d) was enacted "to deal with problems faced by employees who had military training obligations lasting less than three months." App., *infra*, 11a. Observing that "[n]o case has been called to our attention in which a leave of absence of as long as three years has

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might also be shown through requests for leaves of exceptional duration." And, in holding that the one-year leave request at issue in that case was "not *per se* unreasonable," the *Gulf States* court added that "a greater length of time might reach that level." *Id.* at 1469.

been held protected under Section 2024(d)," *ibid.*, the court invoked *Church of the Holy Trinity* v. *United States*, 143 U.S. 457 (1892), for the proposition that a "literal construction" of the statute must be rejected if required to "prevent an absurd, unjust, or unintended result." App., *infra*, 9a-10a. The court then found it necessary "to determine a definite limit beyond which any leave would be unreasonable," and decided that a three year leave was *per se* unreasonable. *Id.* at 11a. Without elaboration, the court added that, "even if we should find that the trial court erred in finding a three-year leave *per se* unreasonable, we would nevertheless hold that on the facts of this case, considering the factors outlined in *Gulf States*, the judgment of the trial court should be affirmed." *Ibid.*

In a separate opinion, Judge Roney agreed with the court's holding that King's three-year leave request "was unreasonable on the facts of this case," but dissented from the adoption of a *per se* rule. In Judge Roney's view, the panel majority approach "might work an injustice in some future case." App., *infra*, 12a.

REASONS FOR GRANTING THE PETITION

This case presents a question of statutory interpretation on which the courts of appeals are divided. In view of Congress's increasing reliance on the reserve forces as an integral part of the Nation's military preparedness, the question is one of great importance.

Congress enacted the Veterans' Reemployment Rights Act (VRRA) to protect the employment status of all individuals serving in the Armed Forces. Section 2024(d) was designed to enable citizens to serve in the National Guard and the Federal reserve units free from economic insecurity. Because service

in the Armed Forces is voluntary, the readiness and integrity of the fighting forces depend on the willingness of citizens to volunteer for such service. The right to reemployment without penalty is an important benefit conferred by Congress on reserve volunteers and thus is an essential tool for fulfilling the manpower needs of the reserves. See generally *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 583 (1977) (the VRRA "provides the mechanism for manning the Armed Forces of the United States.").[4]

By engrafting onto the statute a "reasonableness" requirement, the court of appeals seriously misconstrued the language of the statute and undermined its purpose. In so doing, the court of appeals not only substantially curtailed the protections afforded

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[4] Responsibility for administration of the reemployment rights provisions of Title 38 is vested in the Department of Labor under 38 U.S.C. 2002A. That Section establishes within the Department of Labor an Assistant Secretary for Veterans' Employment and Training "who shall be the principal advisor to the Secretary with respect to the formulation and implementation of all departmental policies and procedures to carry out * * the purposes of * * * chapter 43 of this title" (which includes the reemployment rights provisions for reservists). Section 2002A(b)(1) requires the Secretary of Labor to "carry out all provisions of * * * chapter 43 * * * through the Assistant Secretary * * * and administer through [him] all programs under the jurisdiction of the Secretary for the provision of employment * * * services designed to meet the needs of * * * eligible veterans."

In addition, 38 U.S.C. 2025 requires the Secretary, through the Office of Veterans' Reemployment Rights, "[to] render aid in the replacement in their former positions or reemployment of persons who have satisfactorily completed any period of active duty in the Armed Forces." And 38 U.S.C. 2022 authorizes the United States to represent individuals, like petitioner, in actions involving reemployment rights.

by the VRRA, but created an indeterminate and vague standard that generates uncertainty among employers and potential recruits and frustrates Congress's decision to provide economic security to those who serve in the reserves.[5] In addition, the strict durational limit imposed by the court of appeals in this case creates a powerful disincentive to service in training and other positions, such as the AGR, that require a significant commitment of time. As a result, the rigid *per se* rule established by the court will impair the ability of the reserves to fill these pivotal positions.[6] In light of the conflict in the cir-

[5] Congress has recently stressed the connection between military preparedness and reemployment rights. In a 1986 Joint Resolution, Congress found that "the National Guard and Reserve forces of the United States are an integral part of the total force policy of the United States for national defense." It further found that "attracting and retaining sufficient numbers of qualified persons to serve in the Guard and Reserve is a difficult challenge" and, consequently, "the support of employers and supervisors in granting employees a leave of absence from their jobs to participate in military training without detriment to earned vacation time, promotions, and job benefits is essential to the maintenance of a strong Guard and Reserve force." Act of May 2, 1986, Pub. L. No. 99-290, § 1(a), 100 Stat. 413. Congress called upon "employers and supervisors of employees who are members of the National Guard or Reserve to abide by the provisions of chapter 43 of title 38, United States Code." Pub. L. No. 99-290, § 1(c), 100 Stat. 413. See also, H.R. Rep. No. 504, 99th Cong., 2d Sess. 2 (1986).

[6] As of September 30, 1989, there were almost 34,000 members of the Army and Air National Guard serving tours in the AGR program. See Reserve Forces Policy Board, DOD, 1989 Ann. Rep. at 49. In fiscal year 1989, approximately 12,500 additional reservists and National Guard members served on "active duty for training" under orders specifying a period

cuits over the nature of the protection afforded by Section 2024(d), the clear interpretive error in the Eleventh Circuit's ruling, and the potential impact of this decision, review by this Court is warranted.

1. a. The modern National Guard traces its history to 1933, when Congress established a dual-enlistment system (see Act of June 15, 1933, ch. 87, § 582, 48 Stat. 155), under which every member of the Army National Guard and the Air National Guard is "a Federal reservist as well as a State militiaman." H.R. Rep. No. 1066, 82d Cong., 1st Sess. 9 (1951). See *Perpich* v. *Department of Defense*, 110 S. Ct. 2418, 2425 (1990). National Guard members, in their federal capacity, are part of the Reserve Corps (known as the Ready Reserve) of the Army.[7] The Army National Guard, in combination with the Army Reserve, provide more than half of the combat-ready units of the "Total Army." See, *e.g.*, H.R. Rep. No. 1069, 94th Cong., 2d Sess. 3-5 (1976) (reserve components have become co-equal partners with the active forces in the national defense). Guard members are available to be called to active duty in excess of those in the regular Army during a war or

of duty of 180 days or more. See Manpower Requirements Rep., DOD 1991 Fiscal Year at III-55, IV-49, and VI-43, 44.

[7] The National Guard of the United States is comprised of the Army National Guard and the Air National Guard, 10 U.S.C. 101(9), which are two of the country's seven Reserve force components. See 10 U.S.C. 261. The remaining five components are the Naval, Marine, Coast Guard, Army and Air Force Reserves. All reserve members are assigned to one of three distinct categories created under 10 U.S.C. 267(a): (1) Ready Reserves, (2) Standby Reserves and (3) Retired Reserves. All National Guard members are part of the Ready Reserves.

national emergency. 10 U.S.C. 672(a), 673(a). In addition, the President, with notice to Congress, may call up members of the National Guard for "active duty or active duty for training" in the absence of a national emergency. See Armed Forces Reserve Act of 1952, ch. 608, 66 Stat. 481. See also *Perpich*, 110 S. Ct. at 2425; 10 U.S.C. 672(b), 673a, 673b (active duty).

The most recent codification of reemployment rights for members of the National Guard and other reserve units is found in the VRRA, 38 U.S.C. 2021-2026. Section 2024(a) protects the reemployment rights of those who enlist in the armed forces proper and Section 2024(b)(1) protects the reemployment rights of reservists ordered to active duty. Reservists returning from active duty are entitled to reemployment in their previous job or in a "position of like seniority, status, and pay" after an absence of up to four years, or longer under certain circumstances, and must claim their rights within 90 days of discharge. Sections 2024(a) and (b)(1). Veterans returning from active duty may not be discharged without cause for one year after reemployment. 38 U.S.C. Section 2021(b)(1). Under 38 U.S.C. 2024(c), reservists performing initial active duty training for a continuous period of less than 12 weeks must apply for reemployment within 31 days of discharge and may not be discharged without cause for six months following reemployment.

The provision at issue in this case, 38 U.S.C. 2024(d), enacted in 1960, entitles reservists and National Guard members to a "leave of absence * * * for the period required to perform active duty for training or inactive duty training." See Act of July 12,

1960, Pub. L. No. 86-632, 74 Stat. 467.[8] Section 2024(d), unlike the provision that covers "active duty," contains no limitation on the length of service. Reservists are entitled to reinstatement in the same position they previously occupied if they report back to work "at the beginning of the next regularly scheduled working period." *Ibid.*[9]

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[8] Section 2024(f) expressly provides that, for the purpose of Section 2024(d),

> full-time training or other full-time duty performed by a member of the National Guard under section * * * 502 * * * of title 32 is considered active duty for training.

Although King was ordered to active duty under 10 U.S.C. 672(d) for a brief period at the beginning of his tour (during which he was required to leave the country), his orders to serve "full-time duty (State) in Active Guard/Reserve status" were authorized under 32 U.S.C. 502(f). See App., *infra*, 27a-28a. Because King received his orders for full-time duty under Section 502 of 32 U.S.C., which governs service in the state National Guard, and was not called to "active duty" as authorized by various provisions under Title 10, he remained under the command and control of the State Adjutant General, whom he was assigned to assist. See, *Perpich*, 110 S. Ct. at 2425 ("a member of the [National] Guard who is ordered to active duty in the federal service is thereby relieved of his or her status in the state Guard for the entire period of federal service"). See also Department of Defense Authorization Act, 1980, Pub. L. No. 96-154, Tit. I, 93 Stat. 1141; and see generally England, *The Active Guard/Reserve Program: A New Military Personnel Status*, 106 Mil. L. Rev. 1, 16-28 (1984) (explaining AGR personnel classification scheme).

[9] Reservists also receive protection against discharge, demotion, withdrawal of benefits, or other forms of discrimination upon return from, or on account of, service of a period of training or duty. Under 38 U.S.C. 2021(b)(3), a person cannot be denied "retention * * * promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces." See *Monroe* v. *Standard Oil Co.*, 452 U.S. 549, 557-559 (1981).

b. "Interpretation of a statute must begin with the statute's language." *Mallard* v. *United States District Court for the Southern District of Iowa*, 109 S. Ct. 1814, 1818 (1989); *Hallstrom* v. *Tillamook County*, 110 S. Ct. 304, 308 (1990). Section 2024(d) of Title 38 is written in broad and unqualified terms. It mandates that leave for reserve duty covered by that section "shall upon request be granted," and that reservists "shall be permitted to return to [the] position[s]" they would have occupied "had [they] not been absent for such purposes." True to the statute's broad sweep, the courts have expressly acknowledged the unconditional language of Section 2024(d). As the Third Circuit recently observed, "[Section] 2024(d) does not contain on its face any limitation of the duration of the leave of a reservist for the purpose of carrying out duty for training." *Eidukonis* v. *Southeastern Pennsylvania Transp. Auth.*, 873 F.2d 688, 693 (1989). See also *Kolkhorst* v. *Tilghman*, 897 F.2d 1282, 1286 (4th Cir. 1990) (language of Section 2024(d) is "unequivocal and unqualified"), petition for cert. pending, No. 89-1949; *Cronin* v. *Police Dep't*, 675 F. Supp. 847, 850 (S.D.N.Y. 1987) ("[Section] 2024(d) contains no express limitation with respect to the duration of protected military leave for training.").

Adherence to the language of the statute as written is all the more appropriate given this Court's repeated admonition that the reemployment rights provisions are "to be liberally construed for the benefit of those who * * * serve their country." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); accord *Coffy* v. *Republic Steel Corp.*, 447 U.S. 191, 196 (1980); *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 584 (1977). There is no basis for judicial qualification of the unqualified terms of Section 2024(d), since application of the statute as written does not produce "consequences * * * at variance with the policy of the enactment as a whole." *United States* v. *Rutherford*, 442 U.S. 544, 552 (1979). To the contrary, faithful adherence to the broad terms of the statute is entirely consistent with Congress's evident goals in enacting the VRRA: to guarantee reservists the benefit of secure employment and to remove an important disincentive to service in the reserve forces.

As stated in *Monroe* v. *Standard Oil Co.*, 452 U.S. at 565, "[t]his Court does not sit to draw the most appropriate balance between benefits to employee-reservists and costs to employers. That is the responsibilty of Congress." Congress has performed the calculus by authorizing bona fide tours of duty requiring substantial time commitments and by conferring protection on reservists who undertake them. That should be the end of the matter, regardless of the context. However, the courts should be especially chary of interfering with the exercise of legislative or executive authority over military affairs. See, *e.g.*, *Chappell* v. *Wallace*, 462 U.S. 296, 301 (1983); *Rostker* v. *Goldberg*, 453 U.S. 57, 64-65 (1981). As stated in *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973) (emphasis omitted), "[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches."

c. Nothing in the history of the VRRA generally, or of Section 2024(d) in particular, points to an in-

terpretation at odds with the statutory text.[10] The bill that originally contained Section 2024(d), enacted in 1960, had two principal stated goals, neither of which involved any limitations, durational or otherwise, on leaves of absence under that section. See Act of July 12, 1960, Pub. L. No. 86-632, 74 Stat. 467. First, in a provision codified at 38 U.S.C. 2024 (c), the bill extended to National Guard members the same reemployment protection enjoyed by other reservists who were called to perform "an initial period of active duty for training of 3 to 6 months." S. Rep. No. 1672, 86th Cong., 2d Sess. 1-2 (1960). Second, the bill was designed to "adjust the time period within which leave of absence rights must be asserted" after the performance of training duty other than an initial period of training covered under Section 2024(c). S. Rep. No. 1672, *supra*, at 1. Accordingly, Section 2024(d) requires that, to qualify for protection, reservists returning from "active duty for training or inactive duty training" must return to work "at the beginning of [the] next regularly scheduled working period * * *." *Id.* at 2-3. Apart from this requirement, and that of a "request" to the employer for leave, that Section placed no conditions or limits on the assertion of reemployment rights following a tour of duty falling within its scope.

The 1960 Senate Report on Section 2024(d) states that the Section provides protection for trainees who are absent from employment for short periods, such as two-hour drills, weekend drills, two-week annual encampments, or special training or instruction periods lasting for 30, 60, or 90 days. S. Rep. No. 1672, *supra*, at 2. At least one court of appeals has

[10] Indeed, in view of the clarity of the statutory text, resort to legislative history should not be necessary. See *Burlington N. R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987).

relied in part on this commentary to construe Section 2024(d) as imposing a requirement that a request for leave be reasonable. See *Eidukonis* v. *Southeastern Pennsylvania Transp. Auth.*, 873 F.2d 688, 693 (3d Cir. 1989); see also App., *infra*, 10a. But this history does not support that conclusion.[11]

At the time Section 2024(d) was enacted, members of the "Ready Reserve" had only short and intermittent training obligations, such as those described in the Senate Report. But in response to a fundamental shift in the structure of the Nation's armed forces, the landscape has been altered dramatically over the past generation. Now, the Nation relies heavily on voluntary reservists as a critical component of the potential fighting force. To ensure the readiness of reserve units, Congress has established new training programs and expanded the number and type of positions that must be filled by reservists, including members of the National Guard. See *Kolkhorst* v. *Tilghman*, 897 F.2d at 1285 n.*; see also, *e.g.*, *Gulf States*, 811 F.2d at 1466 (leave requested under Section 2024(d) to enroll in a one-year train-

[11] It is likely that the 1960 Senate Report, which reflects the range of training duty obligations that existed at that time, was the source of the Court's dictum in *Monroe* that Section 2024(d) "was enacted in 1960 to deal with problems faced by employees who had military training obligations lasting less than three months." 452 U.S. at 555. Alternatively, this remark may have been based on the terms of a different provision, 38 U.S.C. 2024(c), that protects reservists for 12 weeks of initial active duty for training. In any event, this observation in *Monroe* is of limited significance to the interpretation of Section 2024(d), as the statement was made in the course of a ruling on the meaning of yet another section of the statute, Section 2021(b)(3), and the Court neither discussed nor considered the various types of training covered under Section 2024(d) that might require significantly longer time commitments.

ing program sponsored by the Army Reserve in response to an acute shortage of nurses); *Eidukonis*, 873 F.2d at 690-692 (leave requested under Section 2024(d) to participate in weapons firing range computer project). Among these are the "full-time support" positions to train reserve units and administer the reserve program which Congress saw fit to authorize in 1980 through the Active Guard/Reserve Program. Army regulations established corresponding duty obligations for the period necessary to provide proper training and continuity in those positions. Army Reg. 136-18, ch. 2, § II, at 2-9 (1985).

Many of these new forms of service, including the AGR program for National Guard members, are classified as "active duty for training" within the meaning of Section 2024(d). See, *e.g.*, notes 2, 6, 8, *supra*; Section 2024(f). These newer positions are thus clearly within the coverage of that Section. In light of Congress's choice of unconditional language, and the absence of durational or other substantive limits, Section 2024(d) should be construed to protect reservists who undertake to serve in any official reserve program coming within the scope of the Section, regardless of the length of service.

In any event, whatever the legislature's intent at the time 2024(d) was first enacted, Congress later modified the VRRA to extend the benefits of Section 2024(d) to reservists serving in the AGR program, and did so as part of its emphasis on the importance of that program. Shortly after the program's creation, Congress amended 38 U.S.C. 2024(f) to provide that members of the National Guard performing "full-time training or other full-time duty" under 32 U.S.C. 502(f) would be considered on "active duty for training," and thus would be entitled to protection under Section 2024(d). See Veterans' Rehabilitation and

Education Amendments of 1980, Pub. L. No. 96-466, § 511(b), 94 Stat. 2207.[12] By amending Section 2024(f) to cover those serving in the AGR program under Section 502, Congress made clear beyond doubt that Section 2024(d) benefits were intended not only for those called to duty of short duration, but also for reservists in King's situation.

To be sure, most Ready Reservists invoke the protections of Section 2024(d) for shorter periods of training—ordinarily, one weekend of inactive duty training per month and 12 days of active duty training per year. But it does not follow that Congress intended reservists on short-term training to be the *exclusive* beneficiaries. See *Board of Governors* v. *Dimension Fin. Corp.*, 474 U.S. 361, 371 (1986) (Congress's choice of general language demonstrates that, although "legislation may have been prompted by the needs" of specific members of a class, "Congress intended to [cover] the class.") To the con-

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[12] As explained in the House Report,

> Members of reserve components who are ordered to active duty for training are entitled to be reemployed by their private employers following their releases from that duty. Full-time training or duty by members of the National Guard under Sections 503-505 of title 32, U.S. Code, is treated like active duty for training for this purpose. *It is now possible to perform full-time training or duty under title 32, U.S. Code, section 502 as well as under sections 503-505.* In order to reflect this, section 502 should be added to the enumeration in section 2024(f) of title 38, U.S. Code. *This section would provide the same reemployment rights following periods of full-time training or duty under title 32, U.S. Code, section 502, as current law provides following duty under Sections 503-505 of title 32, U.S. Code.*

H.R. Rep. No. 498, 96th Cong., 1st Sess. 49 (1979) (emphasis added); see also Explanatory Statement, *reprinted in* 1980 U.S. Code Cong. & Admin. News 4617, 4646.

trary, that provision squarely covers less common situations as well, since it embodies Congress's determination that the Section applies without regard to the length of the leave or other factors that would take away the job security of the reservists who come within its terms. Indeed, as noted, reservists like King—although representing a minority of all those subject to 2024(d)—play a critical role in Congress's plan for maintaining a ready and efficient reserve force.

2. The courts of appeals are divided on the proper interpretation of Section 2024(d). In addition to the court below, the Third Circuit has decided that there is a "reasonableness" test under Section 2024(d), although it has developed a somewhat different formulation. See *Eidukonis* v. *Southeastern Pennsylvania Transp. Auth.*, 873 F.2d at 695-696 (courts should inquire into the length of the leave, the employee's options to schedule the leave at other times, the amount of notice provided, whether the request is for an extension, whether the employee obtained legal advice, the employer's burden and ability to find a substitute, and the sufficiency of the employer's notice to its employees regarding leave policy.) The Fifth Circuit, in *Lee* v. *City of Pensacola*, 634 F.2d 886 (1981), a case relied on by the Eleventh Circuit in *Gulf States*, has also held that a request under Section 2024(d) must be "reasonable." [13]

[13] In addition, the Sixth and Tenth Circuits have addressed the question whether and to what extent a request for leave under Section 2024(d) is subject to a requirement of adequate notice. See *Sawyer* v. *Swift & Co.*, 836 F.2d 1257, 1260-1261 (10th Cir. 1988) (Section 2024(d) does not forbid an employer to require "adequate notice of impending leave); *Burkart* v. *Post-Browning, Inc.*, 859 F.2d 1245, 1247-1248 (6th Cir. 1988) (suggesting same). The *Lee* case, cited in text, also involved, *inter alia*, a question of the adequacy of notice. In the present case, respondent has not asserted that the notice given was inadequate.

In contrast, the Fourth Circuit has held, correctly, in our view, that there is no requirement under Section 2024(d) that a leave request be "reasonable." *Kolkhorst* v. *Tilghman*, 897 F.2d 1282, 1286 (1990), petition for cert. pending, No. 89-1949.[14] In *Kolkhorst*, a municipal police department placed a strict upper limit on the number of officers in the department who could serve as reservists at any one time. The plaintiff in that case was denied permission by his supervisor to join a Marine Corps reserve unit because the department had exceeded the quota. The Fourth Circuit held that the police department's limit on the number of reservists in the department violated Section 2024(d).

The court stated that "the reasonableness standards that have been imposed by other courts are contrary to the purpose of Section 2024(d) to allow reservists to train with their military units without suffering prejudice or any adverse action from their employers." It held that "reasonableness is [not] required under Section 2024(d)." 897 F.2d at 1286. The court noted that "the VRRA unconditionally provides that any reservists '*shall* upon request be granted a leave of absense by such person's employer for the period required to perform' " the pertinent duty. *Ibid.* Quoting *Monroe* v. *Standard Oil Co.*, 452 U.S. at 555, the court observed that, under that

[14] The Solicitor General will shortly file a brief in response to the Court's request on October 1, 1990, for the views of the United States on whether the petition for certiorari in *Kolkhorst* should be granted.

Section, "employees *must* be granted a leave of absence * * * and, upon their return, be restored to their position * * *." 897 F.2d at 1286. The court concluded that "[t]here is nothing in the VRRA, its legislative history, or the *Monroe* decision to indicate that a reservist is entitled to a leave of absence * * * *only* if the request is reasonable based on a judicially created standard that varies from one jurisdiction to the next." *Ibid.*[15]

Although *Kolkhorst* involves a numerical limit, whereas this case presents a durational one, there is a clear-cut difference in the two interpretations of Section 2024(d)—a difference that would have resulted in a different outcome had the Fourth Circuit decided this case. King plainly would be entitled to the full protections of Section 2024(d) under the Fourth Circuit's holding that the statute does not

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[15] The Fourth Circuit went on to state that "[e]ven if a standard of reasonableness were applied to Section 2024(d), we believe that Kolkhorst's request for training leave was reasonable and that the [police] Department's policy limiting to one hundred the number of police officers that are eligible to serve as active military reservists is unreasonable *per se* under any possible formulation of the test." 897 F.2d at 1286-1287.

The Fourth Circuit also held that the police department's action was invalid as a violation of Section 2021(b)(3) of the VRRA, which forbids the denial of "hiring, retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces." See 897 F.2d at 1284-1285. Because the department "planned to fire Kolkhorst, without cause, if he insisted on exercising his statutory right to train with a military reserve unit," the court held that the employer had impermissibly "encroach[ed] upon the normal incidents and advantages of Kolkhorst's employment" in violation of that provision. *Id.* at 1285.

permit a court to consider the reasonableness of a request for leave.[16] The court of appeals in this case took a contrary view. Inasmuch as the question is one of great importance to the effective operation of the reserve program, this Court should grant review to resolve the conflict.

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[16] Although the Fourth Circuit concluded, in the alternative, that Kolkhorst would be entitled to job protection even if a reasonableness test were appropriate under Section 2024(d), it is clear from the opinion that the court's rejection of any such limit on Section 2024(d) rights is controlling law of the circuit and would determine the outcome of any future case.

In *Kolkhorst*, the court also found that the police department's action violated the anti-discrimination provision of Section 2021(b)(3). Although it is possible to challenge an employer's denial of leave as a discriminatory action in violation of Section 2021(b)(3), not every denial of leave that violates Section 2024(d) will also constitute a violation of Section 2021(b)(3), and thus the rights conferred by the two sections are not co-extensive. As this Court stated in *Monroe*, *supra*, Section 2021(b)(3) was enacted for the "significant but limited purpose of protecting the employee-reservist against discriminations like discharge and demotion, motivated *solely by reserve status*." 452 U.S. at 559 (emphasis added). Thus, for example, Section 2021(b)(3) would *not* prohibit the denial of a leave of absence, or discharge or other adverse atcion by an employer based on the *duration* of an employee's leave of absence, as long as the employer was applying a reasonable, neutral policy formulated without regard to the reason for leave. See, *e.g.*, *Sawyer* v. *Swift & Co.*, 836 F.2d at 1261-1262. Thus, in King's case, even if the hospital's action had been challenged under both Sections 2024(d) and 2021(b)(3), a finding that Section 2024(d) had been violated would not require a finding that Section 2021(b)(3) had been violated. Indeed, the employer's action may well have been valid under the latter Section.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1990

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 89-7392

ST. VINCENT'S HOSPITAL, a corporation,
PLAINTIFF-APPELLEE

v.

WILLIAM "SKY" KING,
DEFENDANT-APPELLANT

May 22, 1990

Appeal from the United States District Court
for the Northern District of Alabama

Before TUTTLE*, RONEY*, and HILL*, Senior Circuit Judges.

TUTTLE, Senior Circuit Judge:

This appeal arises from a declaratory judgment action brought by St. Vincent's Hospital (St. Vincent's) to determine its obligations under the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. §§ 2021 *et seq.*, commonly known as

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* *See* Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

the Veterans' Reemployment Rights Act. St. Vincent's had denied a three year leave of absence requested by its employee King, a sergeant major in the Alabama National Guard because King contended that he was entitled to reemployment rights following the termination of a three year tour of duty with the Alabama National Guard. St. Vincent's filed this declaratory judgment action seeking to have the court declare it not to be liable for King's reemployment under the Act.

The trial court found that King's request for a three year leave of absence was "unreasonable" and entered judgment in favor of St. Vincent's.

I. STATEMENT OF FACTS

The parties stipulated to the facts which were then considered by the trial court, together with depositions on file. We find that the trial court properly summarized the agreed upon facts as follows:

> King was employed by the Hospital on September 24, 1979 as manager of its security department. (The department was subsequently renamed Protective Services in 1987.) King supervised twenty-one employees in his department including three full-time supervisors. He advised the Hospital on many matters pertaining to the safety and welfare of its employees and patients.
>
> King characterized his position with the Hospital as a fairly high profile public relations position. The job involved constant contact with patients, employees, and the general public. He also had to deal with the Hospital's professional staff of doctors on a daily basis.

> King has been a reserve member of the Alabama National Guard for thirty-five years. During his employment with St. Vincent's King served on numerous tours of training, some of which were military leaves of absence from St. Vincent's and some of which were taken on his own vacation time, personal days off, or weekends when he was not scheduled to work.
>
> While on an annual two week National Guard leave in June, 1987, King submitted an application for the position of State Command Sergeant Major for the Alabama National Guard. The Command Sergeant Major is an advisor to the Adjutant General on all matters concerning the performance, training, appearance and conduct of enlisted personnel. King knew this was a full time position with the Alabama National Guard and that it required a three-year commitment.
>
> Upon his return to work in late June, King did not inform anyone at the Hospital that he had applied for the Command Sergeant Major position.
>
> King checked on his reemployment rights by telephoning James A. Bishop, a reemployment compliance specialist with the Veterans Reemployment Rights office in Atlanta, Georgia. Bishop advised King that he could serve up to four years on "active duty" and have reemployment rights under the Veterans' Reemployment Rights Act. King recalled that he sought advice from Bishop prior to receiving notice of his selection for the position on July 18, 1987.
>
> On Saturday, July 18, 1987, King was informed by Major General Ivan F. Smith that he had been selected for the position of Command Sergeant Major for the Alabama National

Guard. King was told by General Smith that he would be called on July 10, 1987 with the particulars, but in fact King was not given his August 17, 1987 report date until August 7, 1987. King accepted the appointment, however, on July 18, 1987.

King informed Larry Presto, Vice President of General Clinical Services (and King's immediate supervisor), that he would be taking a position with the Alabama National Guard for a three-year period. King recalled that his conversation took place during the week of July 20 and Presto recalled this conversation's occurring around the first of August, but not in July. At this time, King did not know when he would assume his duties as State Command Sergeant Major and indeed did not discover until August 7 that his military service would begin on August 17.

King was very excited about becoming State Command Sergeant Major with the Alabama National Guard. He believed it to be a great honor even to be considered for such position and thought of it as a great personal honor to anyone. King did not receive a rank promotion, and his principal duties consist[ed] of advising the adjutant general. King accepted the position of Command Sergeant Major because he believed it was an honor to be selected as the number one enlisted person in the Alabama National Guard. He also believed that even though the position did not entail a promotion in rank, it would enable him to contribute his experience to the National Guard and help fulfill his perceived duty and obligation to his State and Nation.

At the time King first informed Presto of his selection as Command Sergeant Major, Presto had King go to the Hospital's publicity department, which resulted in an article's appearing in the Hospital's October 1987, monthly news magazine. Presto stated that he would do whatever Hospital policy and the law required with regard to King's leave request.

King's last day of work with St. Vincent's was August 14, 1987, and he began his three year tour as Command Sergeant Major on August 17, 1987, on which date he received his orders.

On September 1, 1987, King returned to St. Vincent's to help with the transition of his chairmanship of the Hospital's United Way Committee to his successor.

King's work as Manager of Security and then Protective Services was characterized by Presto as exemplary; Betty Williams, the Hospital's Vice-President for Human Resources, called him a very good employee with very good performance evaluations.

On September 8, 1987, after considering King's leave request and receiving advice of counsel, St. Vincent's notified King by letter from Executive Vice-President Vincent Donlon of its decision to deny his leave request. In denying King's request, St. Vincent's stated its belief that King's request did not qualify under the provisions of the Veterans' Reemployment Rights Act and that King's request for such a lengthy period of time was unreasonable.

The provision of the Veterans' Reemployment Rights Act governing King's right to request and receive a leave of absence from his employer is codified at

38 U.S.C. § 2024(d) which states in pertinent part as follows:

> [The] employee . . . shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training, . . . such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes.

38 U.S.C. § 2024(d).

II. ISSUES

1. Is Section 2024(d) subject to a "reasonableness" test in its application?
2. Did the trial court err in finding that King's application for leave was *per se* "unreasonable" or, if not, should the judgment be affirmed because it was "unreasonable" under the circumstances of this case?

III. DISCUSSION

This Court and its predecessor, the Court of Appeals for the Fifth Circuit, have played a prominent part in the construction of Section 2024(d)[1], *Gulf States Paper Corp. v. Ingram*, 811 F.2d 1464 (11th

[1] In *Bonner v. City of Prichard*, (en banc), 661 F.2d 1206 (11th Cir. 1981), this Court adopted as binding precedent all of the decisions of the former Fifth Circuit decided prior to October 1, 1981.

Cir. 1987); *Lee v. City of Pensacola*, 634 F.2d 886 (5th Cir.1981). Although the *Lee* decision is binding precedent for this Court, in *Gulf States*, we stated: "[W]e are further articulating the legal reasonableness standard." 811 F.2d at 1468 (1987). Thus, we look to *Gulf States* for our guidance.

A. *"Per Se Unreasonable"*

As authorized under the Act, King was represented by the United States Department of Justice. Unlike the unsuccessful employee in *Lee* and the successful employee in *Gulf States*, the United States takes the position in this case, that "the plain language of 38 U.S.C. § 2024(d) does not place any limitations on the duration of a leave of absence protected by the Act." App.Br. p. 17. This Court in *Gulf States* rejected this argument if it was made.[2] This Court *stated*:

> Although the statute does not address the "reasonableness" of a reservist's leave request, the Fifth Circuit added a "reasonableness" gloss to Section 2024(d)'s requirements. *Lee*, 634 F.2d at 889. Thus, under *Lee*, a reservist's request must be reasonable to qualify for the protections of the Veterans' Reemployment Rights Act.

Gulf States, 811 F.2d at 1468. We thereafter stated:

[2] It should be noted that the employee plaintiff in *Lee*, who was not represented by the United States, agreed that a "reasonable" standard should apply to the interpretation of the Act. Nevertheless, this Court in *Gulf States* accepted that standard as binding on this Court. The opinion does not indicate that the United States took its current position that the language of Section 2024(d) could not be interpreted as requiring a showing of "reasonableness."

> Eliminating the impermissible factors from the inquiry [as applied by the trial court in that case], all that remains are *the length of the leave, Ingram's actions, and burden upon Gulf States* in filling her position during her absence. For an employer to succeed in proving a request unreasonable, it must overcome the presumption of reasonableness. [*Monroe v. Standard Oil Co.*, 452 U.S. 549, 101 S.Ct. 2510, 69 L.Ed.2d 226 (1981)]. Following *Lee*, the weightiest factor in overcoming that presumption is the conduct of the employee.

Gulf States, 811 F.2d at 1469 (emphasis added). That factor, of course, requires us to consider the good faith of the employee. In *Gulf States*, we stated: "Bad faith conduct might also be shown through requests for leaves of exceptional duration." 811 F.2d at 1470 n. 4. In considering the issue involved in the length of the leave, we stated: "We agree that although one year is not *per se* unreasonable, a greater length of time might reach that level." *Id.* at 1469.

The government contends that these statements by us in *Gulf States* are *dicta*. Nevertheless, we consider them as providing guidance in deciding the present case. The statements were used in our attempt carefully to describe the elements that a court must consider in determining whether a request for leave is reasonable.

Significantly, the Court of Appeals for the Third Circuit in its decision in *Eidukonis v. Southeastern Pennsylvania Transportation Authority*, 873 F.2d 688 (3rd Cir.1989), adopted as the law of the Third Circuit our decisions in *Gulf States* and *Lee*. Although there was a dissenting opinion in *Eidukonis*,

the dissenting judge agreed that the statute should be construed under a standard of reasonableness. The dissent pointed out that:

> it has long been a maxim of statutory construction that " '[g]eneral terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character.' " *Government of Virgin Islands v. Berry*, 604 F.2d 221, 225 (3rd Cir.1979) (quoting *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 486-87, 19 L.Ed. 278 (1868)). Were we to read Section 2024(d) as creating an absolute right of reinstatement, reservists would be allowed to play fast and loose with the system in a way that Congress could not have intended.

Eidukonis, 873 F.2d at 699. The Court of Appeals for the Fifth Circuit has articulated this standard of construing a federal statute most aptly in *United States v. Mendoza*, 565 F.2d 1285 (5th Cir.1978). In that case, the Court of Appeals for the Fifth Circuit stated:

> In the celebrated *Holy Trinity Church* case, *Rector of Holy Trinity Church v. United States*, 143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226 (1982), the Supreme Court held that if a literal construction of the words of a statute would lead to an absurd, unjust or unintended result, the statute must be construed so as to avoid that result.

565 F.2d at 1288.

We are, of course, bound by the previous decisions of this Court applying the "reasonableness" test. However, we note that even were we not so bound, we would independently arrive at the same result. Moreover, as the Court in *Eidukonis* said:

> The Supreme Court has also signified such an interpretation of the legislative history since it stated that the provision 'now codified at 38 U.S.C. 2024(d), was enacted in 1960 to deal with problems faced by employees who had military training obligations lasting less than three months.' *Monroe*, 452 U.S. at 555 [101 S.Ct. at 2514].

Eidukonis, 873 F.2d at 693.

As noted above, the trial court found that the three year leave of absence in this case would be *per se* unreasonable. It, therefore, becomes incumbent on us to determine whether such an interpretation of the statute is necessary to prevent an absurd, unjust, or unintended result. We conclude that it is.

The trial court, after carefully considering the three factors which we stated in *Gulf States* were applicable to a reasonableness determination, stated:

> The court . . . cannot say that King's conduct (apart from the mere act of requesting a three year leave) rises to the level of that "conduct akin to bad faith" contemplated by *Gulf States*. However, "bad faith conduct might also be shown through requests for leaves of exceptional duration." *Gulf States*, 811 F.2d at 1470 n. 4.

It is thus clear that the court construed the length of the requested leave of absence in the context of

the conduct prong which we articulated in *Gulf States*. We also think that the determination whether a three year leave was unreasonable was partially dependent upon the harm to the employer. Although the burden on the employer was partially weighted by the adoption of the statute by Congress, no one could doubt that a longer leave would inevitably be more burdensome on an employer than a short leave. This Court in *Gulf States* stated that "bad faith conduct might also be shown through requests for leave of exceptional duration." We hold, especially in light of the Supreme Court's statement in *Monroe* that this section of the statute was passed "to deal with problems faced by employees who had military training obligations lasting less than three months," *Monroe*, 452 U.S. at 555, 101 S.Ct. at 2514, and, in view of the self-contradictory legislative history of the section, that it is appropriate for this Court to determine a definite limit beyond which any leave would be unreasonable.

No case has been called to our attention in which a leave of absence of as long as three years has been held protected under Section 2024(d). We, therefore, agree with the trial court that a three year leave of absence is *per se* unreasonable.

B. *Unreasonableness on Factors Present in this Case*

Moreover, even if we should find that the trial court erred in finding a three year leave *per se* unreasonable, we would nevertheless hold that on the facts of this case, considering the factors outlined in *Gulf States*, the judgment of the trial court should be affirmed.

IV. CONCLUSION

The judgment is AFFIRMED.

RONEY, Senior Circuit Judge, specially concurring:

I agree with the Court's holding that Sky King's three-year leave request was unreasonable on the facts of this case. I dissent from the adoption of a per se rule. Not only is such a rule unnecessary to the resolution of this case, but it might work an injustice in some future case.

Appellant cites the case of *Lemmon v. Santa Cruz County, California*, 686 F.Supp. 797 (N.D.Cal.1988), which involved a three-year leave request originally made under section 2024(d). In *Lemmon*, a different statutory provision came to apply only after the reservist commenced active duty, and only because his duty assignment was changed. The *Lemmon* court nevertheless applied section 2024(d) case law, including this Circuit's reasonableness test, found a three-year leave *reasonable* on the facts of that case and refused to adopt a three-year-is-per-se-unreasonable rule.

Lemmon illustrates that circumstances may arise in which three-year leave requests, even under section 2024(d), should be granted. In *Lemmon*, the reservist was a Sheriff's Office employee whose position the employer "was able to fill . . . in one day by simply reassigning other personnel within the department." 686 F.Supp. at 802. The employer had initially approved the leave request. Yet, a three-year per se rule would have precluded the statutory relief to which the reservist was entitled.

Fairness dictates that each case be decided with due regard for the particular facts. While bright-line rules certainly have the advantage of mechanical application, it seems unnecessary in the administration of this statute.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CV87-H-1844-S

ST. VINCENT'S HOSPITAL, PLAINTIFF

vs.

WILLIAM "SKY" KING, DEFENDANT

[Filed Apr. 21, 1989]

MEMORANDUM OF DECISION

St. Vincent's Hospital instituted this action on October 16, 1987 seeking a declaration that it had not violated the terms of the Veteran's Reemployment Rights Act by refusing to grant its employee, William "Sky" King, a three-year leave of absence from work to serve as Command Sergeant Major in the Alabama National Guard. The Hospital also seeks a declaration that King has no rights to reemployment (under the Act) upon completion of his tour of duty.

No material fact in this action is disputed by the parties. Pursuant to stipulation by the parties, the court has taken the case under submission on the basis of (1) a "Statement of Agreed Facts" and (2)

the deposition testimony (with exhibits) on file with the court. Also before the court are the parties' arguments in brief and the parties' respective positions regarding portions of the deposition testimony on file.

The undisputed facts are as follows.[1] King was employed by the Hospital on September 24, 1979, as manager of its security department. (The department was subsequently renamed Protective Services in 1987.) King supervised twenty-one employees in his department including three full-time supervisors. He advised the Hospital on many matters pertaining to the safety and welfare of its employees and patients.[2]

King characterized his position with the Hospital as a fairly high profile public relations position. The job involved constant contact with patients, employees, and the general public.[3] He also had to deal

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[1] This summary is adopted from the parties' "Statement of Agreed Facts."

[2] During the course of his employment, King has been involved in criminal investigations on behalf of the Hospital. Presently, there are two lawsuits pending against the Hospital arising out of criminal investigations personally conducted by King. In addition to criminal investigations, King was involved in the Hospital's security efforts during a union organization campaign eight years ago. In addition, King served as chairman of the Hospital's Safety Committee which makes many decisions relative to the Hospital's accreditation process and the Hospital's compliance with OSHA standards and other federal standards.

[3] The Hospital noted in its "Submission of Deposition Testimony" that it faces many unique security problems due to its size, its easy accessibility by the public, and the existence of drugs and other expensive medical equipment on the Hospital's premises.

with the Hospital's professional staff of doctors on a daily basis.

King has been a reserve member of the Alabama National Guard for thirty-five years. During his employment with St. Vincent's King served on numerous tours of training, some of which were military leaves of absence from St. Vincent's and some which [*sic*] were taken on his his own vacation time, personal days off, or weekends when he was not scheduled to work.

While on an annual two week National Guard leave in June, 1987, King submitted an application for the position of State Command Sergeant Major for the Alabama National Guard. The Command Sergeant Major is an advisor to the Adjutant General on all matters concerning the performance, training, appearance and conduct of enlisted personnel. King knew this was a full time position with the Alabama National Guard and that it required a three-year commitment.

Upon his return to work in late June, King did not inform anyone at the Hospital that he had applied for the Command Sergeant Major position.

King checked on his reemployment rights by telephoning James A. Bishop, a reemployment compliance specialist with the Veterans Reemployment Rights office in Atlanta, Georgia. Bishop advised King that he could serve up to four years on "active duty" and have reemployment rights under the Veterans' Reemployment Rights Act.[4] King recalled that

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[4] The Hospital does not dispute that "King told Bishop all he knew regarding his tour of duty and military leave request" nor that "Bishop told King that he had an absolute right to take a three year military leave."

he sought advice from Bishop prior to receiving notice of his selection for the position on July 18, 1987.

On Saturday, July 18, 1987, King was informed by Major General Ivan F. Smith that he had been selected for the position of Command Sergeant Major for the Alabama National Guard. King was told by General Smith that he would be called on July 10, 1987 with the particulars, but in fact King was not given his August 17, 1987 report date until August 7, 1987. King accepted the appointment, however, on July 18, 1987.[5]

King informed Larry Presto, Vice President of General Clinical Services (and King's immediate supervisor), that he would be taking a position with the Alabama National Guard for a three-year period. King recalled that this conversation took place during the week of July 20, and Presto recalled this conversation's occurring around the first of August, but not in July.[6] At this time, King did not know when he would assume his duties as State Command Sergeant Major and indeed did not discover until August 7 that his military service would begin on August 17.

King was very excited about becoming State Command Sergeant Major with the Alabama National Guard. He believed it to be a great honor even to

[5] King accepted the appointment without having first discussed the appointment/leave with his supervisors at the Hospital.

[6] King asserts that also during the week of July 20, 1987, he approached James Nelson, one of his employees, about the possibility of Nelson's replacing him during his tour of duty. King then advised Presto of Nelson's willingness to assume the position during his absence. The Hospital chose someone else, however, to replace King on his departure.

be considered for such position and thought of it as a great personal honor to anyone. King did not receive a rank promotion, and his principal duties consist of advising the adjutant general. King accepted the position of Command Sergeant Major because he believed it was an honor to be selected as the number one enlisted person in the Alabama National Guard. He also believed that even though the position did not entail a promotion in rank, it would enable him to contribute his experience to the National Guard and help fulfill his perceived duty and obligation to his State and Nation.

At the time King first informed Presto of his selection as Command Sergeant Major, Presto had King go to the Hospital's publicity department, which resulted in an article's appearing in the Hospital's October 1987, monthly news magazine. Presto stated that he would do whatever Hospital policy and the law required with regard to King's leave request.

King's last day of work with St. Vincent's was August 14, 1987, and he began his three year tour as Command Sergeant Major on August 17, 1987, on which date he received his orders.

On September 1, 1987, King returned to St. Vincent's to help with the transition of his chairmanship of the Hospital's United Way Committee to his successor.

King's work as Manager of Security and then Protective Services was characterized by Presto as exemplary; Betty Williams, the Hospital's Vice-President for Human Resources, called him a very good employee with very good performance evaluations.[7]

[7] Betty Williams testified in deposition as follows:

> . . . [W]e felt that Sky was acting in good faith; we felt that he was acting on the advice of Mr. Bishop, and he

On September 8, 1987, after considering King's leave request and receiving advice of counsel, St. Vincent's notified King by letter from Executive Vice-President Donlon of its decision to deny his leave request. In denying King's request, St. Vincent's stated its belief that King's request did not qualify under the provisions of the Veteran's Reemployment Rights Act and that King's request for such a lengthy period of time was unreasonable.

The provision of the Veteran's Reemployment Rights Act governing King's right to request and receive a leave of absence from his employment is 38 U.S.C. § 2024(d),[8] which states in pertinent part as follows:

> [The employee] shall upon request be granted a leave of absence by [his] employer for the period required to perform active duty for training . . . in the Armed Forces of the United States. Upon [his] release . . ., [he] shall be permitted to return to [his] position with such seniority, status, pay, and vacation as [he] would have had if [he] had not been absent.

In evaluating King's leave request in light of the above provision, *Gulf States Paper Corp. v. Ingram*, 811 F.2d 1464, 1469 (11th Cir. 1987) requires the court to uphold the leave request if it is reasonable in light of three factors: (1) the length of the leave,

---

had accepted Mr. Bishop's word totally, completely, one hundred percent. We did not feel there was any bad faith on Sky's part at all; we felt that perhaps he had gotten some poor advice.

[8] King received his orders pursuant to 32 U.S.C. § 502(f). Under 38 U.S.C. § 2024(f), full-time duty performed by a member of the National Guard under § 502 is considered "active duty for training" under § 2024(d).

(2) King's conduct, and (3) the burden upon the Hospital in filling King's position during his absence.

King begins with the presumption that his leave request is reasonable. As stated in *Gulf States*:

> We begin with the admonition to liberally construe reemployment rights statutes in favor of those who serve their country. [citations omitted] Next, we acknowledge that Congress is in the best position to weight the benefits to reservists against the burdens upon employers. [citation omitted] In light of these considerations, any judicial inquiry into the reasonableness of leave requests must be limited and extremely deferential to the reservists's rights. The reservist begins with a presumption that her leave request is reasonable.

Gulf States, 811 F.2d at 1468-69. The Hospital bears the burden of overcoming the presumption of reasonableness. Of the three factors, "the weightiest factor" in overcoming the presumption is the employee's conduct. As stated in *Gulf States*:

> The length of the [one-year] leave here places a substantial burden upon the employer in finding and training a replacement. However, burden to the employer alone is not enough to mark a leave request as unreasonable. If it were, every leave would be unreasonable because all leaves generate costs for the employer. . . . Thus, . . . there must be something beyond burden to the employer to reach the unreasonable level. The "something more" is the questionable conduct of the employee . . . In the absence of that type of conduct, [footnote omitted] the reasonableness test most likely will be satisfied.

Gulf States, 811 F.2d at 1469-70.

In evaluating King's conduct, the court is directed to "look for conduct akin to bad faith." *Gulf States*, 811 F.2d at 1469. The Hospital points the court to the following conduct by King: (1) his failure to inform anyone at the Hospital of his pending application for the three-year position of Command Sergeant Major; (2) acceptance of the position without prior consultation with the Hospital; (3) his request for a leave of exceptional duration. As stated by the Hospital in brief:

> Mr. King never discussed his leave request with the Hospital other than by simply informing the Hospital that he would be leaving and under the law the Hospital was required to grant his leave request. St. Vincent's did not know and could not discover until after it received a copy of Mr. King's orders what provision he was being called under and accordingly could not advise Mr. King whether his leave request would be granted or denied until after Mr. King had left.
>
> Regardless of whether or not Mr. King was entitled to the leave of absence from the Hospital, he would have taken the position with the Alabama National Guard. Mr. King completely ignored the difficulties faced by the Hospital because (1) he believed he had an absolute right to his leave request and (2) even if he didn't, he was going anyway. The fact that Mr. King had no subjective bad faith does not relieve him of the responsibility for his actions and conduct in the present case. . . . Mr. King's conduct is akin to bad faith.

The court disagrees. It cannot say that King's conduct (apart from the mere act of requesting a

three-year leave) rises to the level of that "conduct akin to bad faith" contemplated by *Gulf States*. However, "[b]ad faith conduct might also be shown through requests for leaves of exceptional duration." *Gulf States*, 811 F.2d at 1470, n.4.

In addition, *Gulf States* suggests that some leaves might be considered *per se unreasonable* due solely to their length, without any regard to the employee's conduct or the burden placed upon the employer. *Gulf States*, in upholding a one-year leave, stated the following:

> [The district court] correctly considered the length of time of the requested leave. We agree that although one year is not *per se* unreasonable, a greater length of time might reach that level.

This court holds that three years "reach[es] that level." This holding is not in derogation of the other two factors. Indeed, as pointed out in *Gulf States*, a request for a leave of exceptional length might reflect bad faith on the part of the employee. In addition, a long leave would significantly increase the burden borne by the employer.[9]

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[9] Ms. Williams, Vice-President of Human Resources, testified in deposition as follows:

> I believe that three years is too long to have an interim manager in a department. Through our past experience we have found that with interim managers they're very reluctant to make decisions that need to be made, to make changes because they know that this is something, you know, that someone else is going to have to live with down the line, and things just don't get done. There seems to be a status quo in these situations, and we felt that for a year perhaps that would have been fine, but for

In summary, the court holds that the instant three-year leave is per se unreasonable. The Hospital did not violate § 2024(d) of the Veteran's Reemployment Rights Act by refusing to grant King's request for a three-year leave of absence. King accordingly has no rights to reemployment flowing from § 2024(d) upon completion of his tour of duty.

A separate order of final judgment in the Hospital's favor shall be entered contemporaneously herewith.

DONE this 21st day of April, 1989.

/s/ James H. Hancock
United States District Judge

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three years the way our organization changes, we could not tolerate that.

* * * * *

. . . I think this has a serious impact on the department and on the hospital at that point. We're going through that now; the acting person is having a difficult time because he is interim. He doesn't want to make changes if he's not going to be in that department, you know, long term, and that's what traditionally happens.

* * * * *

. . . I don't care who the individual is—now obviously the severity of the impact would depend on the individual, okay? But I don't think any new person who is an interim manager will be comfortable enough to manage the department as effectively as someone who knows that's their job and that they are ultimately responsible and will be responsible down the line. This has been our experience.

Williams, Deposition at 25, 46, 47. Ms. Williams's deposition testimony (at p. 42) that she did not "know of any specific difficulties with the interim manager" does not negate the above testimony.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

No. CV87-H-1844-S

ST. VINCENT'S HOSPITAL, PLAINTIFF

vs.

WILLIAM "SKY" KING, DEFENDANT

[Entered Apr. 21, 1989]

FINAL JUDGMENT

In accordance with the Memorandum of Decision entered this day, it is hereby

ORDERED, ADJUDGED and DECREED that judgment in favor of the plaintiff is hereby ENTERED.

Costs are taxed against the defendant.

DONE this 21st day of April, 1989.

/s/ James H. Hancock
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-7392

ST. VINCENT'S HOSPITAL, a corporation,
PLAINTIFF-APPELLEE

versus

WILLIAM "SKY" KING,
DEFENDANT-APPELLANT

[Filed Aug. 21, 1990]

Appeal from the United States District Court for the Northern District of Alabama

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ON PETITION(S) FOR REHEARING

(August 21, 1990)

BEFORE: TUTTLE*, RONEY* and HILL*, Senior Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellant WILLIAM "SKY" KING, is denied.

ENTERED FOR THE COURT:

/s/ Elbert Butler
United States Circuit Judge

---

* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-7392

ST. VINCENT'S HOSPITAL, a corporation,
PLAINTIFF-APPELLEE

versus

WILLIAM "SKY" KING,
DEFENDANT-APPELLANT

[Filed Aug. 29, 1990]

Appeal from the United States District Court
for the Northern District of Alabama

SUGGESTION FOR REHEARING EN BANC

(August 29, 1990)

BEFORE: TUTTLE*, RONEY* and HILL*, Senior Circuit Judges.

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* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

PER CURIAM:

No Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Gerald Bard Tjoflat
Chief Judge

APPENDIX F

ALABAMA

STATE MILITARY DEPARTMENT
Office of the Adjutant General
P.O. Box 3711
Montgomery, Alabama 36193-4701

ORDERS 158-1 17 August 1987

KING, WILLIAM D 420-40-6747 CSM HQ STARC AL ARNG, Montgomery, Alabama 36193-4701

You are ordered to full-time duty (State) in Active Guard/Reserve status in the grade shown above for the period indicated. Upon completion of the period of duty, unless sooner released or extended by proper authority, you will return to the place where you entered duty and be released from such duty. You will proceed in time to report on the date shown below.

Report to: State Military Department, Montgomery, Alabama 36193-4701

Reporting date: 17 August 1987

Assigned to: HQ STARC, AL ARNG, Montgomery, Alabama 36193-4701

Attached to: N/A

Period (full-time duty commitment): Three (3) Years (17 Aug 87 - 16 Aug 90)

Add instr: By issue and acceptance of this order, indiv affected and State auth consent to placing the indiv affected automatically on active duty under Title 10 USC 672(d) for duration of duty directed OCONUS TDY, upon compl of which indiv will

revert automatically to full-time duty (State). If in the event of mobilization, indiv affected is ordered to active duty under auth of Title 10, USC, the unexecuted portion of this order will terminate automatically the day prior to mobilization date. AGR tours for FY88/89/90 are subj to avail funds. Indiv ordered to AGR with his/her consent and the consent of the Gov of Al. Cont of tour is subj to indiv being granted SECRET Scty C1 if required. Indiv auth RNA subs. Indiv entitled to CMAB/CMAS. Indiv auth BAQ at the with dependent rate (BAQPD). Successful compl of required NGB Military Education Program (MEP) tng is necessary for continued AGR service. ACT-GRD-RESIDENT: 32 USC 502(f). ACT-STAT-PROG: READINESS SUPPORT MISSION. Initial tour. First year probationary period.

FOR ARNG/ARMY USE

Auth: 32 USC 502(f) and sec 502, Public Law 98-94. Do not access into the strength of active army.

Acct clas: ARNGAL FY87/88/90/90 BP/ALWS/Other Pay/FICA 2172060/2182060/2192060/2102060 18-99 P3153.16 1199/1250 S99999.

Number of days lump sum leave pd since 10 Feb 76: None.

SPMD POS: State Command Sergeant Major, TDA WBASAA, Para 001 Lin 07, E9, 00Z50

PMOS/SSI: 00Z50

HOR: 728 Barclay Lane, Birmingham, AL 35206

SEX: Male

Format: 175

UIC (of assignment): WBASAA (200)

Security Clearance: SECRET

PEBD: 9 Dec 53

JUMPS AA Payroll Prefix: 6 ARNGAL

BY ORDER OF THE GOVNERNOR:

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NO. 90-889

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1990

WILLIAM "SKY" KING,

Petitioner,

v.

ST. VINCENT'S HOSPITAL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

*HARRY L. HOPKINS
MORRIS WADE RICHARDSON

Lange, Simpson, Robinson & Somerville
1700 First Alabama Bank Building
Birmingham, Alabama 35203-3272
Telephone (205) 250-5000

**Counsel of Record*

QUESTION PRESENTED

Whether under 38 U.S.C. § 2024(d) an employee/reservist has an absolute right, on demand, to an extended leave of absence from his civilian employment, without regard to the length of the leave, the timing of the demand, or any other legitimate needs of his/her employer.

PARTIES TO THE PROCEEDING

The parties to the proceeding are correctly stated in the Petition. There is no parent or subsidiary company to be listed on behalf of St. Vincent's Hospital.

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TABLE OF AUTHORITIES

TABLE OF AUTHORITIES — (Continued)

STATUTE INVOLVED

38 U.S.C. § 2024(d) (1982) of the Veterans' Reemployment Rights Act provides in pertinent part:

> Any employee . . . shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training, . . . such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes. Such employee shall report for work at the beginning of the next regularly scheduled working period after expiration of the last calendar day necessary to travel from the place of training to the place of employment following such employee's release, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control. Failure to report for work at such next regularly scheduled working period shall make the employee subject to the conduct rules of the employer pertaining to explanations and discipline with respect to absence from scheduled work. . . .

STATEMENT OF THE CASE

St. Vincent's Hospital is satisfied with the facts as presented in the Court of Appeals and district court memorandum opinions. Pet. App. 1a-22a. St. Vincent's brought this action against William "Sky" King pursuant to 28 U.S.C. § 2201, seeking a declaration that King's request for a three-year leave of absence to serve as State Command Sergeant Major in the Alabama National Guard was unreasonable and that St. Vincent's did not violate the Veterans'

Reemployment Rights Act, with amendments, in denying King's leave request. St. Vincent's further sought a declaration that King had no right to reemployment by St. Vincent's under the Act upon completion of his military service. On April 22, 1989, the district court, based upon stipulated facts, held that the three-year leave request was *per se* unreasonable and entered judgment in favor of St. Vincent's Hospital. The United States Court of Appeals for the Eleventh Circuit affirmed on May 22, 1990, concluding that "even if we should find that the trial court erred in finding a three-year leave *per se* unreasonable, we would nevertheless hold that on the facts of this case, considering the factors outlined in *Gulf States*, the judgment of the trial court should be affirmed." Pet. App. 11a.

REASONS FOR DENYING THE WRIT

1. There is no conflict among the Courts of Appeals on the same matter.

The Solicitor General, on behalf of William "Sky" King, has petitioned this Court for a writ of certiorari advancing as the basis for the granting of the writ a conflict among the Courts of Appeals in the application of reemployment rights of employee reservists under Section 2024(d).[1] The Solicitor asserts that the decision of the Fourth Circuit Court of Appeals in *Kolkhorst v. Tilghman*, 897 F.2d 1282 (4th Cir. 1990), directly conflicts with the decision of the Eleventh Circuit

[1]These rights are more accurately called leave-of-absence rights rather than reemployment rights. S. Rep. No. 1672, 86th Cong., 2d Sess. 2 *reprinted in* 1960 U.S. Code Cong. & Admin. News 3077, 3077.

Court of Appeals in this case.[2] In addition, the Solicitor insists that the "reasonableness" requirement for extended leave requests misconstrues the language of 2024(d) and substantially curtails the protection afforded reservists by the Veterans' Reemployment Rights Act ("Act"). Pet. 7-8. The *Kolkhorst* decision does not conflict with the "reasonableness" requirement applied by the Eleventh Circuit and it does not conflict with other Circuits in the application of 2024(d) to employee reservist extended leave requests.[3]

Kolkhorst was a police officer with the Baltimore City Police Department. The Department had an internal policy limiting to one hundred the number of police officers (other than new hires) who could serve as active reservists. Kolkhorst, at the time he joined the Department, was a member of the Marine Corps Individual Ready Reserve and had no regular monthly or annual training obligations. After joining the Department, Kolkhorst asked for permission to join a Selected Marine Corps Reserve unit which would require him to attend monthly and annual training. His request was denied pending an opening in the Department's

[2]The Solicitor suggests that the Fourth Circuit decision also conflicts with the Third Circuit decision in *Eidukonis v. Southeastern Pennsylvania Transportation Auth.*, 873 F.2d 688 (3d Cir. 1989); the Eleventh Circuit's earlier decision in *Gulf States Paper Corp. v. Ingram*, 811 F.2d 1464 (11th Cir. 1987); the Fifth Circuit's decision in *Lee v. City of Pensacola*, 634 F.2d 886 (5th Cir. 1981); language in the Sixth Circuit decision in *Burkart v. Post-Browning, Inc.*, 859 F.2d 1245 (3d Cir. 1989) and language in the Tenth Circuit decision in *Sawyer v. Swift & Co.*, 836 F.2d 1257 (10th Cir. 1988). Pet. 18.

[3]The district court in *Kolkhorst* applied the Eleventh Circuit's *Gulf States* "reasonableness" analysis in determining that the plaintiff's leave request was protected under the Act. *Kolkhorst v. Robinson*, 131 L.R.R.M. (BNA) 2671, 2673 (D. Md. 1988), *aff'd*, 897 F.2d 1282 (4th Cir. 1990). And, the Fourth Circuit concluded that "if we were to apply a reasonableness standard under Section 2024(d), we would find that Kolkhorst's request for leave was entirely reasonable, and that the Department's arbitrary policy was not." 897 F.2d at 1287.

reservist list. Notwithstanding the denial, Kolkhorst joined a Selected Reserve unit and trained on weekends, arranging for leaves of absence with his immediate superiors. Upon being ordered to the annual two week summer training, Kolkhorst requested a leave of absence. His request was denied and after an investigation by the Department into his reserve status, Kolkhorst was ordered by the Department to remove himself from the Selected Reserves.

The Fourth Circuit Court of Appeals affirmed the district court's judgment[4] in favor of Kolkhorst holding that the Police Department's actions in establishing a quota for reservists and denying Kolkhorst's leave request violated the nondiscrimination provisions of 38 U.S.C. § 2021(b)(3) (1982). 897 F.2d at 1283. The Court held "that the Department's official reservist policy, which clearly precipitated the unlawful measures taken by the Department . . . , conflicts directly with the language and purpose of Section 2021(b)(3), and cannot be countenanced thereunder."[5] Regarding Kolkhorst's two week leave request, the Court opined "We do not believe that reasonableness is required under Section 2024(d)" . . . and "the reasonableness standards that have been imposed by other courts are contrary to the purpose of

[4]The district court in considering Kolkhorst's 2024(d) claim stated that "[a]lthough Section 2024(d) by its terms provides for no exceptions, Courts have used a rule of reason as the lubricant necessary to make the statutory machinery function." 131 L.R.R.M. (BNA) at 2673. Concluding that the approach taken by the Eleventh Circuit in *Gulf States Paper Corp. v. Ingram*, 811 F.2d 1464 (11th Cir. 1987), was the correct one, the district court declared that "the Department's one hundred person limit on the number of officers who may be active reservists [was] unlawful and direct[ed] the Department to grant plaintiff's request that he be permitted to join a Marine Corps Reserve Unit." *Id.*

[5]897 F.2d at 1285. The Solicitor does not contend that St. Vincent's denial of King's three year leave request violated 2021(b)(3). Pet. 21 n.16 ("Indeed, the employer's action may well have been valid under [this] section.").

Section 2024(d) to allow reservists to train with their military units without suffering prejudice or any adverse action from their employers." 897 F.2d at 1286. The Fourth Circuit's discussion of the "reasonableness" inquiry under 2024(d) was not warranted by the facts. The principal holding was that the Department's quota system violated 2021(b)(3) and there was no need for the Court to articulate anything further. Even though the Fourth Circuit strayed unnecessarily from section 2021(b)(3), it promptly returned to the heart of the case when it noted that "the Department does not even consider the reasonableness of an employee's request for leave if the employee is not one of the one hundred persons eligible for reservist training." *Id.* at 1287.

Kolkhorst was requesting leave for the annual two week training which 2024(d) was enacted to allow. There is no reasonableness requirement for such a request and no court has ever held that there is such a requirement.[6] Every Circuit Court of Appeals that has applied a reasonableness standard to leave requests under 2024(d) has done so in the context of extended leave requests not a part of routine service in the reserves.[7] Thus, the Fourth Circuit's observation that no "reasonableness" standard applied to Kolkhorst's request is

[6]"Under § 2024(d), an employer is required to grant a leave of absence for Guard training if the period of training is less than three consecutive months." *Crank v. ATR, Inc.*, 133 L.R.R.M. (BNA) 3043, 3044 (E.D. Ky. 1990).

[7]In *Eidukonis v. Southeastern Pennsylvania Transportation Authority*, 873 F.2d 688 (3d Cir. 1989), the Third Circuit found a reservist's request of a twenty-six day extension of a one hundred and forty day leave to be unreasonable under the circumstances. The Eleventh Circuit approved a one year leave request to participate in a licensed practical nurse training program in *Gulf States Paper Corp. v. Ingram*, 811 F.2d 1464 (11th Cir. 1987), finding that the request was reasonable. And in *Lee v. City of Pensacola*, 634 F.2d 886 (5th Cir. 1981), the Fifth Circuit disapproved the extension of a fifty day leave for an additional one hundred and forty seven days.

entirely correct and consistent with every other court's analysis of the same matter. The Solicitor contends that the language of 2024(d) does not place any "reasonableness" limitation on extended leave requests under the Act. Referencing the Fifth Circuit's decision in *Lee v. City of Pensacola*, 634 F.2d 886 (5th Cir. 1981) and its own earlier decision in *Gulf States Paper Corp. v. Ingram*, 811 F.2d 1464 (11th Cir. 1987), the Eleventh Circuit rejected this argument. The Court recognized, quoting the dissent in *Eidukonis v. Southeastern Pennsylvania Transportation Authority*, 873 F.2d 688 (3d Cir. 1989), that such an interpretation would lead to injustice, oppression, and absurd consequences and would allow reservists "to play fast and loose with the system in a way that Congress could not have intended." Pet. App. 9a. A reasonableness requirement is necessary when considering anything other than "military training obligations lasting less than three months"[8] for the statutory scheme to work.[9]

The Third Circuit in *Eidukonis* adopted the reasonableness standard in evaluating extended leave requests under 2024(d). Plaintiff was dismissed by his employer after he

[8]*Monroe v. Standard Oil Co.*, 452 U.S. 549, 555 (1981).

[9]*See Eidukonis v. Southeastern Pennsylvania Transportation Authority*, 873 F.2d 688 (3d Cir. 1989); *Gulf States Paper Corp. v. Ingram*, 811 F.2d 1464 (11th Cir. 1987); *Lee v. City of Pensacola*, 634 F.2d 886 (5th Cir. 1981). Although Congress through section 2024(d) "intended to prevent discrimination in employment as a result of a reservist's military obligation . . . it did not intend thereby to endow a reservist with unreasonable powers over his employer or cause his employer unreasonable hardship." *Lee v. City of Pensacola*, 634 F.2d at 888 (quoting district court opinion). This Court, in considering whether an employer was required to adjust an employee's work schedule to make up for time lost because of military obligations, recognized in *Monroe* that the Act is not intended to and does not impose "additional obligations upon employers, guaranteeing that employee-reservists have the opportunity to work the same number of hours, or earn the same amount of pay that they would have earned without absences attributable to military reserve duties. . . . " 452 U.S. at 564.

failed to report to work upon the refusal of his employer to grant him an extension of his leave of absence. After exhaustively reviewing the legislative history of section 2024(d) the Third Circuit found "nothing in the legislative history of section 2024(d) to indicate that Congress contemplated that it was authorizing reservists to take leaves of unlimited duration for Reserve service." 873 F.2d at 693.

The application of a reasonableness standard to extended leave requests under 2024(d) is necessary to make the statute work. "This section was designed to provide reemployment protection for trainees who are absent from employment for only a short period of time, such as 2-hour drills, weekend drills, 2-week annual encampments, and special training or instruction periods that may last for 30, 60 or 90 days." S. Rep. No. 1672, 86th Cong., 2d Sess. 2 *reprinted in* 1960 U.S. Code & Admin. News 3077, 3078. As the 1960 Senate Report recognized, "[a] period of 30 days [allowed in 2024(c)] within which to assert leave of absence rights by persons performing inactive duty training . . . is unrealistic." *Id.* Accordingly, to be entitled to 2024(d) protection, Congress required the employee to report for work at the beginning of the employee's next regularly scheduled work period. It is unrealistic to expect an employee reservist to report for work at the beginning of his next regularly scheduled working period after a hiatus of three years.

The Solicitor insists, however, that apart from the requirements that the reservist "request" the leave and return to work "at the beginning of [the] next regularly scheduled working period," there are "no conditions or limits on the assertion of reemployment rights following a tour of duty falling within [2024(d)'s] scope."[10] Pet. 14. The Army Guard

[10]The Department of the Army takes a different view in that it not only denied a leave request and cancelled the reservists orders, but also terminated a civilian employee/reservist because of his failure to "reasonably" request a leave of absence. *See Ellermets v. Department of Army*, 916 F.2d 702 (Fed. Cir. 1990).

Reserve Program provides for periods of active duty of up to five years and these periods of active duty may be renewed upon completion. 10 U.S.C. § 679(a) (1982). Consequently, under the Solicitor's view, a reservist could conceivably obtain leaves from his civilian employment for four five year tours, retire, and then expect to return to his civilian employment twenty years later and at his next regularly scheduled work period "with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes." 38 U.S.C. 2024(d). Such unrealistic and preferential treatment for reservists was not envisioned by Congress. This Court has previously recognized "that Congress did not intend employers to provide special benefits to employee-reservists not generally made available to other employees." *Monroe v. Standard Oil Company*, 452 U.S. 549, 561 (1981). Employers are to make a reasonable accommodation to employee-reservists requesting extended leaves under 2024(d) — not an absolute accommodation that grants reservists greater benefits and privileges than those available to other employees.

Kolkhorst's two week leave request clearly fell within the intended scope of 2024(d) and the Fourth Circuit's observation that no reasonableness standard applied to those facts was correct and consistent with other courts' application of 2024(d). The conflict urged by the Solicitor does not exist in fact. The Eleventh Circuit would reach the same decision in *Kolkhorst* as did the Fourth Circuit. Because no challenge to the length of a leave request was presented to the Fourth Circuit, it cannot be said with confidence that a different outcome "would have resulted . . . had the Fourth Circuit decided this case." Pet. 20. There can be no conflict *on the same matter* when the result in both cases is a correct application of 2024(d) protection. No review of the present case is warranted by this Court because there is no conflict in the Circuits over the nature of protection afforded by 2024(d).

2. This case does not present an important question of federal law warranting review by this Court.

Applying a reasonableness standard to extended leave requests under 2024(d) is not so appalling that review is called for by this Court. Lower courts have correctly and consistently applied a reasonableness standard to extended leave requests under 2024(d).[11] Each case turns mainly upon its own special facts and is of consequence primarily to the individual parties. Nevertheless, the Solicitor contends that reviewing each extended leave request to determine whether it is reasonable "creates an indeterminate and vague standard that generates uncertainty among employers and potential recruits" and that the three year bright-line rule established by the Eleventh Circuit in this case will "impair the ability of the reserves to fill . . . pivotal positions." Pet. 8. However, as demonstrated by the handful of cases in which a "reasonableness" determination has been requested, extended leaves under 2024(d) are uncommon and do not play a major role in reserve service.[12] King's three year leave request to serve as Command Sergeant Major in the

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[11] *See, e.g., Lemmon v. Santa Cruz County, California*, 686 F. Supp. 797 (N.D. Cal. 1988) (initial ten month leave found reasonable under 2024(d)); *Barber v. Gulf Publishing Company, Inc.*, 122 L.R.R.M. (BNA) 2344 (S.D. Miss. 1986) (Five month leave reasonable); *Anthony v. Basic American Foods, Inc.*, 600 F. Supp. 352 (N.D. Cal. 1984) (Four and one-half month leave reasonable); *Green v. Spartan Stores, Inc.*, 112 L.R.R.M. (BNA) 2099 (W.D. Mich. 1982) (additional six week leave reasonable). There are only seven cases, other than this case, involving extended leave requests under 2024(d). These include the four district court opinions cited above and three Circuit Court opinions (*Eidukonis, Gulf States*, and *Lee*). Every case applied the "reasonableness" standard and in all but two cases (*Eidukonis* and *Lee*), the leave was found to be reasonable.

[12] Reemployment rights of National Guard and Reserve forces presently being called to active service as a result of the crisis in Saudi Arabia are not governed by 2024(d).

Alabama National Guard is unique. There are no other reported instances of such a lengthy request.[13] Moreover, the denial of King's three year leave request clearly did not "impair the ability of the reserves to fill" the Command Sergeant Major position since King testified that even had he been told that he would have no reemployment rights upon completion of his three year tour of duty, he would still have left his employment and taken the Command Sergeant Major position.

National Guard and Reserve members are full-time employees and part-time soldiers. St. Vincent's recognizes the essential role members of the National Guard and Reserve play in our national defense[14] and agrees that "[t]o fulfill mission requirements, National Guard and Reserve personnel must have the opportunity for meaningful and realistic training — *both at monthly inactive duty training drills and two weeks' active duty for training.*" H.R. Rep. No. 504, 99th Cong. 2d Session 2 (1986) (emphasis added). Congress has urged employers to cooperate with the Reserve services scheme and an interpretation of 2024(d) that gives employees the right to extended leave on demand without consideration of the legitimate needs of their employers is not productive to this spirit of cooperation. As recognized in Eidukonis, "while Congress expects employers to be patriotic, we do not believe that it expects them to forego all legitimate business concerns." 873 F.2d at 694. Allowing extended leaves on demand would frustrate the compromise established in the Veterans' Reemployment Rights Act between the obligations of a part-time soldier to his Government and full-time employee to his employer.

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[13] *See infra* note 11.

[14] Act of May 2, 1986, Pub. L. No. 99-290, § 1(b), 100 Stat. 413.

Implicitly conceding that the legislative history in the form of the 1960 Senate Report evidences Congress' belief that at the time 2024(d) was enacted, it was to apply to leave requests lasting less than three months, the Solicitor urges that a "fundamental shift in the structure of the Nation's armed forces" and heavy reliance "on voluntary reservists as a critical component of the potential fighting force" justifies extended leaves under 2024(d). Pet. 14-15. The Solicitor points to Congress' authorization of new training programs and expansion of the number and type of positions to be filled by reservists as an indication of Congress' intent "beyond doubt" that 2024(d) benefits were to apply not only to leave requests of short duration, "but also for reservists in King's situation." Pet. 16-17. However, Congress' choice of the "unconditional language" now urged as encompassing these extended leaves occurred when these programs were not in existence and there is nothing in the legislative history of 2024(d) or in subsequent actions by Congress to support the argument that leaves of unlimited duration are mandated.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit is due to be denied.

Respectfully submitted,

Harry L. Hopkins
Morris Wade Richardson

Attorneys for Respondent

January, 1991

No. 90-889

In the Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM "SKY" KING, PETITIONER

v.

ST. VINCENT'S HOSPITAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

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TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1990

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REPLY MEMORANDUM FOR THE UNITED STATES

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1. Respondent argues that the court of appeals' decision is not in conflict with the Fourth Circuit's decision in *Kolkhorst* v. *Tilghman*, 897 F.2d 1282 (1990), petition for cert. pending, No. 89-1949, because "[t]he Eleventh Circuit would reach the same decision in *Kolkhorst* as did the Fourth Circuit," and the Fourth Circuit, if called upon to decide the instant case, might not decide it differently. Br. in Opp. 2-6, 8. Thus, respondent contends that this Court should deny review because in neither case would the outcome necessarily depend on the circuit in which the case was decided.

We disagree. In the wake of *Kolkhorst*, we believe the Fourth Circuit would be bound to rule that 38 U.S.C. 2024(d) of the Veterans' Reemployment Rights Act protects the reemployment rights of reservists in petitioner's posi-

tion. The Fourth Circuit stated categorically in *Kolkhorst* that there is no requirement under Section 2024(d) that a leave request be "reasonable." 897 F.2d at 1286. That statement was not confined to the particular circumstances in *Kolkhorst*, nor was it qualified by any limitation based on the duration of the leave. In order to rule against a reservist in petitioner's situation, the Fourth Circuit would have to reject its interpretation of Section 2024(d) in *Kolkhorst*. Thus, there is a conflict among the circuits that warrants this Court's review.

With respect to respondent's suggestion that the outcome in *Kolkhorst* might be the same in the court below as in the Fourth Circuit, we believe the court of appeals' discussion of reasonableness in the instant case makes it impossible to predict how that court would rule on the Section 2024(d) issue presented in *Kolkhorst*. If anything, however, this uncertainty is a further reason to grant the petition. As discussed in the petition, at 8, 18, the difficulty of determining whether a given reservist will be found entitled to Section 2024(d) protection under the reasonableness tests formulated by the Eleventh Circuit in this case, and by the Third and Fifth Circuits in other cases, is due to the inherent vagueness of that standard. Moreover, not only do the Fourth and Eleventh Circuits disagree over whether there is any reasonableness test at all, but there is also disagreement among the courts of appeals on how reasonableness is to be evaluated. See Pet. 18. This disarray in the law, by "generat[ing] uncertainty among employers and potential recruits," defeats the central purpose of the reemployment rights provision: to provide an incentive for reserve service by insuring "economic security to those who serve in the reserves." Pet. 8.[1]

[1] Respondent implies that *Kolkhorst* did not present the issue of whether Section 2024(d) imposes a reasonableness requirement because, in denying Kolkhorst's request to go on leave to train with his reserve unit once the employer's quota had been met, the employer "[did] not even consider the reasonableness of [that] employee's request." Br. in Opp. 5.

The flaw in this argument is that it rests on the assumption that "reasonableness" must be assessed by looking, in isolation, at the individual circumstances of a reservist's leave request and the impact of that reservist's service obligations on the employer. But, if there is to be a reasonableness test, it is hard to see why it must focus solely on the individual employee. Rather, the reasonableness of an employee's request might be evaluated in terms of the incremental effect on the employer of that employee's training duty obligations, in light of the burden simultaneously imposed by the reserve obligations of other employees.

2. Based on what respondent describes as a "handful" of cases, it asserts that "extended leaves under 2024(d) are uncommon and do not play a major role in reserve service." Br. in Opp. 9. That statement could not be further from the truth. At last count, there were more than 45,000 reservists on tours of "active duty for training" requiring at least 180 days of service. See Pet. 8 n.6. The importance of these reservists is, if anything, greater than their considerable numbers would indicate. Many fill key positions as full-time support personnel assigned to train reserve units and administer the reserve program; others engage in specialized training to develop skills essential to the effectiveness and readiness of the total fighting force. See Pet. 15-16. By raising doubts about the reemployment rights of these reservists, the decision below threatens to undermine recruitment efforts and disrupt the operation of the reserve programs. The government therefore has a strong interest in review of this case.

3. Respondent errs in suggesting (Br. in Opp. 7 n.10) that, in *Ellermets* v. *Department of the Army*, 916 F.2d 702 (Fed. Cir. 1990), the Department of the Army has "take[n] a different view" of the proper interpretation of Section 2024(d). In that case, a civilian employee of the Army

Corps of Engineers left his job for reserve duty *before* informing his superiors of his need for leave. 916 F.2d at 705. The court held that, under those circumstances, the employer could deny him a leave of absence under Section 2024(d).

The question presented in *Ellermets* was whether an employer is required to grant a leave of absence for reserve service if the reservist fails to make the request before he departs for duty. The court of appeals' negative answer is entirely consistent with the government's position in this case. In the present petition, the government acknowledged that one of the requirements imposed by Section 2024(d) is that the employee "request" a leave of absence from the employer. See Pet. 14. One who fails to inform his employer of the need for leave until after the leave has begun can hardly be viewed as having complied with the statutory requirement to make a "request." Thus, the question whether an employee has given timely notice of his need for leave – the question presented in *Ellermets* – is analytically distinct from the question presented here.[2]

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JANUARY 1991

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[2] A requirement of timely notice – of a "request" – can serve important purposes even if an employer may not refuse on the ground that the request is "unreasonable." It allows an employer to take some advance action to compensate for the employee's absence and, in some instances, to see whether the employee himself can make alternative arrangements.

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No. 90-839

In the Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM "SKY" KING, PETITIONER

v.

ST. VINCENT'S HOSPITAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether an employee's right under 38 U.S.C. 2024(d) to leave of absence from employment to serve in the Armed Forces of the United States is conditioned on the "reasonableness" of the employee's request for leave.

PARTIES TO THE PROCEEDING

The parties to this proceeding are William "Sky" King and St. Vincent's Hospital.[1]

[1] Petitioner is represented by the United States pursuant to 38 U.S.C. 2022, which authorizes the United States to represent individuals in actions involving reemployment rights. See also Pet. 7 n.4.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 901 F.2d 1068. The opinion of the district court (Pet. App. 13a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1990. A petition for rehearing was denied on August 21, 1990. Pet. App. 24a. On November 9, 1990, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including December 17, 1990. The petition was filed on December 5, 1990, and granted by this Court on February 19, 1991.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The principal statutory provision involved is 38 U.S.C. 2024(d), App., *infra*, 4a-5a. Also reprinted in the Appendix are 32 U.S.C. 502(f) (App., *infra*, 1a) and 38 U.S.C. 2024 in its entirely (App., *infra*, 1a-6a).

STATEMENT

1. The question in this case is whether petitioner, a member of the National Guard, is entitled to a leave of absence from his civilian job to serve for three years in the Active Guard/Reserve Program. Analysis of this question requires consideration of the role of the National Guard and the Reserve forces, and of the evolution of the statutory provisions designed to protect the reemployment rights of members of the Reserves.

The petitioner in this case is a member of the Army National Guard of the United States—one of the seven Reserve components of the Armed Forces of the United States.[2] See 10 U.S.C. 261. National

[2] The National Guard of the United States is comprised of the Army National Guard and the Air National Guard, see 10 U.S.C. 101(9), which are two of the country's seven Reserve force components. See 10 U.S.C. 261. The remaining five components are the Naval, Marine, Coast Guard, Army and Air Force Reserve (which are referred to herein as the Federal Reserve components). All reserve members are assigned to one of three distinct categories created under 10 U.S.C. 267(a): (1) Ready Reserve (a battle-ready component), (2) Standby Reserve, and (3) Retired Reserve. All National Guard members are part of the Ready Reserve. See England, *The Active Guard/Reserve Program: A New*

Guard members, in their federal capacity, are part of the Reserve Corps (known as the "Ready Reserve") of the Army. In accordance with a dual enlistment system dating from 1933, see Act of June 15, 1933, ch. 87, § 582, 48 Stat. 155, under which every member of the Army and Air National Guard of the United States is "a Federal reservist as well as a State militiaman," H.R. Rep. No. 1066, 82d Cong., 1st Sess. 9 (1951), petitioner serves at the same time as a member of the Army National Guard of the United States and of his state National Guard (the Alabama National Guard). See *Perpich* v. *Department of Defense*, 110 S. Ct. 2418, 2426 n.19 (1990).

Members of the National Guard and of the Federal Reserve components (see note 2, *supra*) are available to be called to active duty during a war or in a National Emergency. See 10 U.S.C. 672(a), 673(a). The President also has the power, in the absence of such an emergency, to call up members of the Reserves either for "active duty" or "active duty for training" of varying duration. See Armed Forces Reserve Act of 1952, ch. 608, 66 Stat. 481; *Perpich* v. *Department of Defense*, 110 S. Ct. at 2420-2421 n.1.[3] Members of the National Guard may

Military Personnel Status, 106 Mil. L. Rev. 1, 3-4 (1984) (reviewing organization and history of Reserve components) [hereinafter *The AGR Program*].

[3] See also 10 U.S.C. 672(b) (involuntary call-up of 15 days), 672(d) (voluntary call-up of indefinite duration), 673a (call to active duty for up to 24 consecutive months of Ready Reservist "who has not fulfilled his statutory reserve obligation"), 673(a) (call to active duty for 24 months in an emergency or "when otherwise authorized by law"), 673b (call to active duty for up to 180 days "when the President determines that it is necessary to augment the active

be ordered to serve training or other duty under Title 10 as members of the Ready Reserve of the United States. They may also serve tours of duty under the authority of Title 32 (Sections 501 through 507), which governs training and other duty in the Army and Air National Guard of the United States.[4]

2. Reservists are citizen soldiers. As such, they ordinarily hold civilian jobs from which they must be absent if called to train or serve on active duty. Like other members of the Armed Forces of the United States, Reservists enjoy reemployment rights guaranteed by statute.

a. Statutory reemployment rights for members of the Armed Forces date from the Nation's first peacetime draft law, enacted in 1940. Section 8 of the Selective Training and Service Act of 1940, ch. 720, 54 Stat. 890 (the precedessor of the provision now codified at 38 U.S.C. 2021(a)) provided that a veteran returning from active duty was entitled to be reinstated in his previous civilian position.

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forces for any operational mission"). President Bush recently called more than 200,000 reservists into active duty in the Persian Gulf, as part of Operations Desert Shield and Desert Storm, under the authority conferred by Section 673b. See 1990 Department of Defense, *Total Force Policy, Report to Congress,* at 18-19 [hereinafter *1990 DOD Report to Congress*].

[4] Members of the National Guard who are ordered into active duty (including active duty for training) under Title 10—which governs service in the federal capacity—"lose their status as members of the State militia during their period of active duty." *Perpich* v. *Department of Defense,* 110 S. Ct. at 2426. Members of the National Guard who serve on orders issued under Title 32 retain their state status. See note 25, *infra.*

In 1952, "in order to strengthen the Nation's Reserve Forces," see *Monroe* v. *Standard Oil Co.,* 452 U.S. 549, 555 (1981), Congress for the first time granted job reinstatement rights to members of the Armed Forces, including Reservists, upon return from "training duty." See Universal Military Training and Service Act of 1951, Pub. L. No. 51, § 1 (s), 65 Stat. 86-87.[5] In 1955, Congress enacted another provision (now codified, as amended, at 38 U.S.C. 2024(c)) that protects reemployment rights for a period of full-time, intensive, initial active duty training (IADT) that is required of some Reservists. The 1955 enactment granted Reservists returning from such tours (which were to run from three to six months) the same reemployment rights as inductees. See Reserve Forces Act of 1955, Pub. L. No. 305, § 262 (f), 69 Stat. 602.[6]

b. In 1960, Congress amended the law regarding leaves of absence for "active duty for training," re-

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[5] As codified at 50 U.S.C. App. 459(g)(3) (1958), the new provision provided that "any employee"

> shall be granted a leave of absence by his employer for the purpose of being inducted into, entering, determining his physical fitness to enter, or performing training duty in, the Armed Forces of the United States. Upon his release from training duty or upon his rejection, such employee shall, if he makes application for reinstatement within thirty days following his release, be reinstated in his position without reduction in his seniority, status, or pay except as such reduction may be made for all employees similarly situated.

[6] See also, § 262(a)-(c), 69 Stat. 600 (governing enlistments in the Ready Reserve of the United States Armed Forces, and requiring performance of "an initial period of active duty for training of not less than three months or more than six months").

taining a separate section for IADT, and expressly extending rights under that section to members of the National Guard. Congress also added the provision at issue in this case, now codified at 38 U.S.C. 2024 (d), which entitles Reservists and National Guard members to a "leave of absence * * * for the period required to perform active duty for training or inactive duty training." See Act of July 12, 1960, Pub. L. No. 86-632, 74 Stat. 467; see also S. Rep. No. 1672, 86th Cong., 2d Sess. 1 (1960); H.R. Rep. No. 1263, 86th Cong., 2d Sess. 6-7 (1960) (setting forth amendments to reemployment rights provisions then codified at 50 U.S.C. App. 459 *et seq.*).

c. The most recent revision and codification of the reemployment rights provisions applicable to Reservists is chapter 43 of the Vietnam Era Veterans Readjustment Assistance Act of 1974, 38 U.S.C. 2021 *et seq.*, which is known as the Veterans' Reemployment Rights Act (VRRA or the Act), 38 U.S.C. 2021-2026. Section 2024(a) of the VRRA gives protection for up to four and, in some cases, five years to the reemployment rights of those who enlist in the Armed Forces proper. Section 2024(b)(1) and (2) protect the reemployment rights of Reservists ordered to active duty for a period of up to four years, or longer under certain circumstances.[7]

Reservists and enlistees returning from such active duty are entitled to reemployment in their previous

[7] Section 2024(b)(1) and (2) do not apply, however, to Reservists ordered to "active duty of not more than 90 days under [10 U.S.C.] Section 673b." Section 2024(g) provides that such persons

> shall be entitled to all reemployment rights and benefits provided under [Section 2024(c) of 38 U.S.C.] for persons ordered to an initial period of active duty for training of not less than twelve consecutive weeks.

jobs or in "position[s] of like seniority, status, and pay," provided that they apply for reemployment within 90 days of discharge from duty. 38 U.S.C. 2021(a). Veterans returning from active duty may not be discharged without cause for one year after reemployment. 38 U.S.C. 2021(b)(1).

Under 38 U.S.C. 2024(c), discussed above, Reservists performing IADT for a continuous period of not less than 12 weeks are entitled to reemployment provided that they apply within 31 days of discharge. An employer may not discharge a Reservist returning from IADT without cause for six months following reemployment.

The provision at issue in this case, 38 U.S.C. 2024 (d), protects Reservists performing "active duty for training or inactive duty training," other than IADT. Section 2024(d) requires employers, upon request, to grant Reservists and National Guard members a "leave of absence * * * for the period required to perform" such duty. Unlike Sections 2024(a), 2024 (b)(1), and 2024(b)(2), which cover "active duty," Section 2024(d) contains no limitation on the length of service. Reservists are entitled to reinstatement in the same position they previously occupied if they report back to work "at the beginning of the next regularly scheduled working period." *Ibid.*[8]

[8] All Reservists also receive protection against discharge, demotion, withdrawal of benefits, or other forms of discrimination upon return from, or on account of, service for a period of training or duty. Under 38 U.S.C. 2021(b)(3), a person cannot be denied "retention, * * * promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces." See *Monroe* v. *Standard Oil, Inc.*, 452 U.S. 549, 557-559 (1981). Section 2021(b)(3) was amended in 1986 to prohibit discrimination in hiring of reservists as well. See Pub. L. No. 99-576, § 331, 100 Stat. 3279.

3. Petitioner William "Sky" King is a 35-year veteran of the Alabama National Guard. In June 1987, he applied to serve as Command Sergeant Major, the highest post for an enlisted member of the state National Guard. The Command Sergeant Major, who assists and advises the Adjutant General,[9] serves in the Active Guard/Reserve (AGR) Program, see Pet. App. 3a, 27a, which Congress created in 1980. See Department of Defense Authorization Act of 1980, Pub. L. No. 96-107, Tit. IV, § 401(b), 93 Stat. 807. See also *The AGR Program*, 106 Mil. L. Rev. at 16-28 (describing the origins and nature of the AGR program). The AGR program authorizes members of the Reserve components, including the National Guard of the United States, to serve full-time tours of duty for the purpose of "organizing, administering, recruiting, instructing, or training the reserve components." *Id.* at 16. Army regulations require AGR personnel to serve three-year tours of duty. Army Reg. 135-18, Ch. 2, § II, at 2-9 (1985).[10] Under 38 U.S.C. 2024(f), members of the National Guard serving in the AGR Program in petitioner's capacity are entitled to reemployment rights under 38 U.S.C. 2024(d). See note 11 and pages 33-35, *infra*.

On July 18, the Alabama National Guard informed King that he had been selected for the position of Command Sergeant Major, and King accepted im-

[9] The Adjutant General is the commanding officer of the Alabama National Guard. See 32 U.S.C. 314(a).

[10] The civilian "military technicians" that the AGR personnel were supposed to replace served three-year tours of duty at the time the AGR Program was created. See *Lemmon* v. *Santa Cruz County*, 686 F. Supp. 797, 798 (N.D. Cal. 1988).

mediately. Pet. App. 3a-4a. At some point between mid-July and early August, King notified his supervisor at St. Vincent's Hospital, where King was employed as manager of the security department, that he had accepted a three-year position with the Alabama National Guard. *Id.* at 4a. Although the National Guard told petitioner that he would be informed on July 10 of the date he was to report for duty, it was not until August 7 that he was told to report on August 17. As instructed, petitioner began his three-year tour of duty on that day. *Id.* at 4a-5a.

On September 8, 1987, respondent notified petitioner by letter that his military leave request was denied. The letter stated that, in the employer's view, petitioner's request for a three-year period of leave was unreasonable and that petitioner therefore did not qualify for leave under the VRRA. Pet. App. 5a.

4. The hospital then filed a declaratory judgment action in the United States District Court for the Northern District of Alabama to determine whether petitioner was entitled under the VRRA to a leave of absence for his three-year tour of duty in the AGR Program. The district court concluded that petitioner's tour of duty fell within the scope of Section 2024 (d) of the VRRA. See Pet. App. 18a & n.8.[11]

[11] Petitioner was called to full-time duty in the National Guard under 32 U.S.C. 502(f), see App., *infra*, 1a. In deciding that petitioner enjoyed job protection under 38 U.S.C. 2024(d), the court relied on 38 U.S.C. 2024(f), which provides:

> For the purposes of subsections (c) and (d) of this section, full-time training or other full-time duty performed by a member of the National Guard under sec-

Applying the "reasonableness" test set forth in the Eleventh Circuit's decision in *Gulf States Paper Corp.* v. *Ingram*, 811 F.2d 1464, 1469 (1987),[12] the district court determined that, apart from the length of the leave, petitioner's conduct in requesting leave was not blameworthy. See Pet. App. 18a-21a. The court held, however, that a request for a three-year leave was *per se* unreasonable and that petitioner was therefore not entitled to reemployment rights under Section 2024(d). Pet. App. 20a-22a.

5. The court of appeals for the Eleventh Circuit affirmed, with Judge Roney concurring in part and in the result. The court relied heavily on its previous

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tion 316, 502, 503, 504, or 505 of title 32 is considered active duty for training.

As the court explained, 38 U.S.C. 2024(f) makes clear that full-time duty performed by a National Guard member under Section 502 is considered "active duty for training" under Section 2024(d). Pet. App. 18a n.8.

[12] In *Gulf States*, the Eleventh Circuit identified three factors to be taken into account in evaluating whether a military leave request is reasonable under 38 U.S.C. 2024(d): "the length of the leave, [the employee's] actions, and the burden upon [the employer] in filling [the] position during [the] absence." 811 F.2d at 1469. The *Gulf States* court stated that the employee enjoys a presumption of reasonableness, that "burden on the employer alone is not enough" to defeat the presumption, and that "the weightiest factor in overcoming that presumption is the conduct of the employee." *Ibid.* Only "conduct akin to bad faith on the employee's part" will lead to a finding of unreasonableness. *Ibid.* The court determined, however, that "bad faith conduct might also be shown through requests for leaves of exceptional duration." 811 F.2d at 1470 n.4. The court then held that the one-year leave request at issue in that case was "not *per se* unreasonable," but added that "a greater length of time might reach that level." 811 F.2d at 1469.

analysis in *Gulf States*. There, although acknowledging that "the statute does not address the 'reasonableness' of a reservist's leave request," the court engrafted a "reasonableness" requirement onto Section 2024(d). Pet. App. 7a. In the present case, the court of appeals reiterated the *Gulf States* standard, see note 12, *supra*, that the reasonableness of a request was dependent, in large part, on the Reservist's conduct, and that a request for leave "of exceptional duration" might amount to bad faith conduct justifying denial of leave. Pet. App. 8a.

The court described the legislative history of Section 2024(d) as "self-contradictory," Pet. App. 11a, but took note of the statement in *Monroe* v. *Standard Oil Co.*, 452 U.S. 549, 555 (1981), that Section 2024(d) was enacted "to deal with problems faced by employees who had military training obligations lasting less than three months." Observing that "[n]o case had been called to our attention in which a leave of absence of as long as three years has been held protected under Section 2024(d)" (Pet. App. 11a), the court invoked *Church of Holy Trinity* v. *United States*, 143 U.S. 457 (1892), for the proposition that a "literal construction" of a statute must be rejected to "prevent an absurd, unjust, or unintended result." Pet. App. 9a-10a. The court then found it necessary "to determine a definite limit beyond which any leave would be unreasonable," and decided that a three-year leave was *per se* unreasonable. *Id.* at 11a. Without elaboration, the court added that, "even if we should find that the trial court erred in finding a three year leave *per se* unreasonable, we would nevertheless hold that on the facts of this case, considering the factors outlined in *Gulf States*, the judgment of the trial court should be affirmed." *Ibid.*

In a separate opinion, Judge Roney agreed with the court's holding that petitioner's three-year leave request "was unreasonable on the facts of this case." However, Judge Roney disagreed with the court's adoption of a *per se* rule because "it might work an injustice in some future case." Pet. App. 12a.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. a. The question in this case is whether Section 2024(d) of the VRRA entitles petitioner to a leave of absence from his job for a three-year period of full-time service in the AGR Program. In answering this question in the negative, the court of appeals seriously misconstrued the language of the statute, diluted its force, and undermined its purpose.

The court of appeals read Section 2024(d) to grant a Reservist who is called to "active duty for training" the right to return to his job *only* if a court (balancing three factors) finds the leave request "reasonable," and then ruled that petitioner's request for leave was *per se* unreasonable. In so deciding, the court substantially curtailed the protections afforded by the VRRA by creating an indeterminate and vague standard that generates uncertainty among employers and potential recruits and frustrates Congress's decision to provide economic security to those who serve in the Reserves. The judicially created "reasonableness" test transforms a concrete entitlement—upon which a Reservist can rely in deciding whether to join the Reserves or commit to special training—into a conditional and ambiguous right upon which few would risk their civilian livelihood. In addition, the strict durational limit imposed by the court of appeals creates a powerful disincentive to service in training and other positions, such as the AGR, that require a significant commitment of time.

The rigid *per se* rule established by the court of appeals hobbles the Nation's ability to recruit Reservists in pivotal support positions, and properly to train personnel. As a result, the readiness and integrity of the Reserve components, and of the Armed Forces as a whole, is compromised.

b. The court of appeals' construction of Section 2024(d) is incorrect. The requirement of "reasonableness" finds no support in the text of Section 2024(d). Nor is there any basis for judicial qualification of those terms, since application of the statute as written does not produce "consequence[s] * * * at variance with the policy of the enactment as a whole." *United States* v. *Rutherford*, 442 U.S. 544, 552 (1979). To the contrary, faithful adherence to the broad terms of the statute is necessary to carry out Congress's goals in enacting the VRRA: to guarantee Reservists the benefit of secure employment and to aid recruitment by removing an important disincentive to service.

The qualifications judicially superimposed on Section 2024(d) also run contrary to the principle—stated by this Court—that veterans' reemployment rights must be liberally construed; these qualifications are also at odds with this Court's admonition to avoid interfering with the exercise of legislative or executive judgments concerning military affairs. Finally, the holding ignores Congress's explicit determination that service in the AGR Program should come within the scope of Section 2024(d) and receive full protection under that Section.

2. Even if a "reasonableness" rule may be applied to qualify the right conferred by Section 2024(d), the three-year leave requested by "Sky" King was not unreasonable. Proper deference to the judgment of military authorities should preclude a court from

holding unreasonable the *duration* of a requested leave to serve under a bona fide military order. Moreover, proper deference to congressional judgment in establishing the AGR program requires that a tour of duty to serve in that program be protected under Section 2024(d). Finally, and especially in view of the protection of longer tours of duty under other provisions of the VRRA, three years is not an unduly long period for a requested leave under Section 2024 (d) of that Act.

ARGUMENT

I. SECTION 2024(d) OF THE VETERANS' REEMPLOYMENT RIGHTS ACT DOES NOT CONDITION THE RIGHT TO A LEAVE OF ABSENCE ON THE REASONABLENESS OF THE REQUEST FOR LEAVE

A. A Reasonableness Requirement Is Contrary To The Plain Language Of Section 2024(d) And Negates Its Core Purpose

1. Section 2024(d) is written in broad and unqualified terms. It mandates that leave for reserve duty covered by that Section "shall upon request be granted," and that Reservists "shall be permitted to return to [the] position[s]" they would have occupied "had [they] not been absent for such purposes." As the Fourth Circuit recently observed, the language of Section 2024(d) is "unequivocal and unqualified." *Kolkhorst* v. *Tilghman*, 897 F.2d 1282, 1286 (1990), petition for cert. pending, No. 89-1949; see also *Monroe* v. *Standard Oil Co.*, 452 U.S. at 553 n.7 ("[Section 2024(d)] *compels* employers to grant leaves of absence to employees who must attend reserve training") (emphasis added). And, as the Third Circuit noted, "[Section] 2024(d) does not contain on its

face any limitation of the duration of the leave of a reservist for the purpose of carrying out duty for training." *Eidukonis* v. *Southeastern Pennsylvania Transp. Auth.*, 873 F.2d 688, 693 (1989). See also *Cronin* v. *Police Dep't*, 675 F. Supp. 847, 850 (S.D. N.Y. 1987) ("[Section] 2024(d) contains no express limitation with respect to the duration of protected military leave for training."). There can be no doubt, then, that the language of Section 2024(d) imposes no durational limit, nor any qualification of any kind, upon the right of a Reservist who requests leave to return to his civilian job after taking that leave.

2. Despite the clear terms of Section 2024(d), the Eleventh Circuit engrafted a reasonableness requirement into the statute, holding that a Reservist has no right to return to his job unless the requested leave is "reasonable." Pet. App. 9a-11a. Not only does that construction of Section 2024(d) flout the language of Section 2024(d), but, by qualifying the unqualified rights protected by that Section, the court of appeals has dramatically curtailed the reemployment rights of Reservists serving tours of duty that clearly fall within its scope.

The main principle underlying the VRRA is that no person should suffer a penalty in his civilian job by reason of his absence from that job to fulfill his obligations as a member of the Armed Forces. See *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946); *Tilton* v. *Missouri P. R.R.*, 376 U.S. 169, 170-171 (1964); *Accardi* v. *Pennsylvania R.R.*, 383 U.S. 225, 228 (1966). The VRRA "clearly manifests a purpose and desire on the part of the Congress to provide as nearly as possible that persons * * * upon returning to civilian life, resume their old employment without any loss because of

their service to their country." *Ibid.* Indeed, this Court has stated that the judicial branch must give "as liberal a construction for the benefit of the veteran [to each separate provision of the VRRA] as a harmonious interplay of the separate provisions permits." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. at 285. See also *Coffy* v. *Republic Steel Corp.*, 447 U.S. 191, 196 (1980); *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 584 (1977). Especially in light of this Court's repeated admonition that the reemployment rights provisions are "to be liberally construed for the benefit of those who * * * serve their country," *Fishfold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. at 285, no judicial qualification should be imposed on the reemployment rights conferred by the statute as written.

3. When Congress adopted Section 2024(d), this Court had firmly established the doctrine of liberally construing the VRRA for the benefit of the veteran. Thus, Congress was on notice that any limitations or conditions upon the rights granted to veterans must be explicit. See *McNary* v. *Haitian Refugee Center, Inc.*, No. 89-1332 (Feb. 20, 1991), slip op. 16 ("Congress legislates with knowledge of our basic rules of statutory construction."). Yet, in Section 2024(d), no condition (other than that of a "request") was imposed.[13] Rather, as the Court pointed out in *Monroe* v. *Standard Oil Co.*, Congress carefully struck the desired balance between the rights of Reservists and the needs of employers in the express terms of Section 2024(d). See 452 U.S. at 564 ("[A] 'reasonable accommodation' to employee-reservists because of missed worktime has already been made by Congress in § 2024(d). There, Congress decided what allowance employers should make to reservists whose duties force them to miss time at work: provide them a leave of absence.").

[13] The requirement that an employee-reservist "request" leave from his employer has been construed by several courts of appeals to impose a condition of timely and adequate notice to the employer of the employee's impending need for leave. See, *e.g.*, *Sawyer* v. *Swift & Co.*, 836 F.2d 1257, 1260-1261 (10th Cir. 1988) (Section 2024(d) does not forbid an employer to require "adequate" notice of impending leave); *Burkart* v. *Post-Browning, Inc.*, 859 F.2d 1245, 1247-1248 (6th Cir. 1988) (suggesting same); *Ellermets* v. *Department of the Army*, 916 F.2d 702 (Fed. Cir. 1990) (under Section 2024(d), Reservist must inform his superiors *before* he departs for leave). The question whether such a condition is imposed by the statute is not presented in this case, since respondent here has not claimed, and the courts below did not suggest, that the notice given by petitioner was inadequate. But we note that the statutory requirement of a "request" does appear to embrace some notion of timely notice, since it is difficult to believe that Congress mandated a "request" as an empty gesture. Even if an employer may not refuse on the ground that the request is "unreasonable," the requirement that the employee "request" leave can serve important purposes. It allows an employer to take some advance action to compensate for the employee's absence and, in some instances, to see whether the employee himself can make alternative arrangements.

Moreover, Congress knew how to impose durational limits on reemployment protections for members of the Armed Forces, and did so in other sections of the VRRA. A Reservist who enters on active duty or enlists in the Armed Forces proper ordinarily retains the right to return to his previous job, or a similar position, for at least four years. See 38 U.S.C. 2024(a) (enlistees); 38 U.S.C. 2024(b)(1) (tour of active duty).[14] The provision that applies to

[14] Under some circumstances, Reservists on "active duty" can retain their reemployment rights without any durational

Reservists who serve on active duty as part of a limited call-up by the President under 10 U.S.C. 673b (as occurred at the start of Operation Desert Shield) protects reemployment rights for the duration of service on "active duty for not more than 90 days." 38 U.S.C. 2024(g).[15] In contrast, the Act places no express time limits on reemployment rights for persons drafted into the Armed Forces, see 38 U.S.C. 2021(a), or engaged in initial active duty for train-

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limit for a period of extension of active duty by the military beyond four years. See 38 U.S.C. 2024(a); 38 U.S.C. 2024 (b)(1). See also Section 2024(b)(2).

[15] Although Section 2024(g) refers to 90-day tours of duty, Section 673b of Title 10 has, since 1976, allowed the President to extend tours under that Section for up to 180 days. See 10 U.S.C. 673b (permitting the President to call 200,000 Reservists to duty for 90 days, subject to a 90 day extension). The disparity raises the question whether Section 2024(d) guarantees reemployment to Reservists originally deployed in the Persian Gulf under Section 673b for 180 days. This potential problem was solved by a retroactive amendment to Section 2024(g) that strikes out the reference to 90 days, thereby removing any durational limit on VRRA coverage for involuntary duty under Section 673b. See Pub. L. No. 102-12, § 8, 105 Stat. 34.

Also, on January 18, 1991, President Bush issued Exec. Order No. 12,743, which declared that Reservists originally called up on the authority of Section 673b would henceforth be considered mobilized under 10 U.S.C. 673(a) allowing the President to call 1,000,000 members of the Ready Reserve to active duty (other than for training) for 24 months "[i]n time of National emergency declared by the President * * * or when otherwise authorized by law". Reservists called to active duty under Section 673 (as opposed to 673b) enjoy reemployment rights under 38 U.S.C. 2024(b)(1) and (2), which impose no durational limit as long as the President's call-up order is in effect and the individual Reservist has not been issued orders relieving him from active duty.

ing, see 38 U.S.C. 2024(c) (although the duration of such training is fixed by statute, see note 6, *supra*). In the same vein, the Act says nothing about the duration of training duty that is entitled to protection under 2024(d).

"Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983); *General Motors Corp.* v. *United States*, 110 S. Ct. 2528 (1990); *Gozlon-Peretz* v. *United States*, No. 89-7370 (Feb. 19, 1991), slip. op. 8-9. Here, Congress has chosen within the same statute to place time limits on reemployment rights with respect to some kinds of service, but not others. It follows that if Congress had wanted Reservists engaged in "active duty for training" to enjoy reemployment rights for a limited time only, or to qualify for reemployment rights only under limited circumstances, "it could have [said] so expressly." Cf., *Monroe* v. *Standard Oil Co.*, 452 U.S. at 564 (Court will not impose a "reasonable accommodation" requirement under the antidiscrimination provision of Section 2021(b)(3) of the VRRA, since Congress "could have done so expressly," but did not).

Moreover, the limits Congress has imposed are simple and unambiguous, providing both Reservist and employer with clear notice of their respective rights and responsibilities. Congress has chosen not to incorporate a multi-factor balancing test, complete with indeterminate criteria that inevitably generate uncertainty and apprehension. Congress's considered choice—whether wise or not—was much simpler, more straightforward, and easier to apply. Courts

therefore do violence to Congress's ordained scheme by redrafting the statute to include such criteria. See *Monroe* v. *Standard Oil Co.*, 452 U.S. at 565 ("If Congress desires to amend § 2021(b)(3) [to include a reasonable accommodation requirement], it is free to do so. But we must deal with the law as it is.").

4. Reading a "reasonableness" requirement, or a durational limit, into Section 2024(d) directly frustrates the statutory purpose. In enacting the reemployment rights provisions of the VRRA, Congress sought not only to boost morale and to provide an important benefit to those who serve their country, but also to create an effective tool for encouraging service in the Armed Forces. See *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 583 (1977) (the VRRA "provides the mechanism for manning the Armed Forces of the United States."); *Carter* v. *United States*, 407 F.2d 1238, 1243 (D.C. Cir. 1968). By conferring clearcut and unqualified rights to reemployment without penalty following training or other duty coming within its scope, Section 2024(d) removes one of the most important disincentives to voluntary service in the Reserves—the fear that such service comes at the price of loss of livelihood.

Changes in defense policy within the last generation have dramatically transformed the role of the Reserve components, but at the same time have increased the difficulty of maintaining a sizeable and properly trained Reserve force. Because of the Nation's heavy reliance, as part of the Total Force concept, on the Reserve forces as a key component of the Nation's armed services, significant curtailment of the protections afforded Reservists under Section 2024(d) would have an especially adverse impact on military preparedness.

a. Following abolition of the draft in the early 1970s and the creation of an all-volunteer force, see *The AGR Program*, 106 Mil. L. Rev. at 7, the willingness of citizens to volunteer for service in all components of the Armed Forces—including the Reserves—became critical to the strength and integrity of the fighting force. In the wake of the draft's demise, then Secretary of Defense Melvin Laird articulated a "Total Force Policy" that was formally adopted by the DOD in 1973. That Policy had as its objective "to maintain as small an active peacetime force as national security policy, military strategy, and overseas commitments permit, and to integrate the capabilities and strength of the active and reserve forces in a cost-effective manner." *1990 DOD Report to Congress, supra*, at 13. Instead of merely serving as an emergency manpower source, the "Ready Reserve" became an integral part of the Armed Forces of the United States. See *The AGR Program*, 106 Mil. L. Rev. at 5-7. See also H.R. Rep. No. 504, 99th Cong., 2d Sess. 2 (1986) ("Under the Total Force Policy, the Reserve components [are used] * * * as the initial and primary augmentation of the active forces in the event of mobilization. In many instances, the active forces would be unable to deploy and accomplish their mission without National Guard and Reserve augmentation."). Over the last 20 years, the Ready Reserve units have come to provide about one-half of the Army's combat power and two-thirds of its combat service support and wartime medical capability. *Ibid.*[16]

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[16] See also H.R. Rep. No. 1069, 94th Cong., 2d Sess. 3-5 (1976) (reserve components have become co-equal partners with the active forces in the national defense); H.R. Rep. No. 107, 98th Cong., 1st Sess. 202 (1983) (commenting on

These changes in policy required a dramatic increase in the size of the service forces. But, as the military services became dependent on citizen volunteers, reserve recruiting and retention declined. See *The AGR Program*, 106 Mil. L. Rev. at 7.[17] And as Reservists became harder to recruit, "the nature of the Reserve mission * * * changed." The Department of Defense attempted to replace a modest-sized force capable only of "slow-moving general mobilization" with a large, well-trained, battle-ready reserve force "immediately available to augment active duty personnel in important front-line duty." See *The AGR Program*, 106 Mil. L. Rev. at 6; see also DOD, *Annual Report of the Secretary of Defense on Reserve Forces*, Fiscal Year 1975, at 1 (1976).

This transformation necessitated more rigorous and sophisticated training for members of the National Guard and the Ready Reserve. Reservists need extensive training to be fully prepared to play their crucial military role on short notice alongside the regular forces. See H.R. Rep. No. 504, 99th Cong., 2d Sess. 2 (1986) (to fulfill mission requirements, Ready Reserve personnel "must have the opportunity for meaningful and realistic training"); *The AGR Program*, 106 Mil. L. Rev. at 7 (increased reliance "demanded fully trained and disciplined Reserves").

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the role of Reserves in the Total Force); *The AGR Program*, 106 Mil. L. Rev. at 6-7; *1990 DOD Report to Congress*, at 21 (in 1950, 51% of Army military manpower, and 27% of Air Force military manpower were found in the reserve components).

[17] Every annual report by the Secretary of Defense throughout the 1970s noted a major problem in maintaining a sufficient number of Reservists, and attributed the difficulty principally to the elimination of the draft, which had provided a major incentive for joining the Reserves. See 106 Mil. L. Rev. at 8 & nn. 36-38.

The need for more intensive and elaborate training was also compounded by the Armed Forces' growing dependence on advanced technology, in both its weaponry and support capabilities. Many of the modern skills necessary to operate complex weaponry, computers, and support equipment cannot be learned by a Reservist over a weekend or in fourteen days. As the training programs have proliferated in number and complexity, they have also increased in length, requiring a greater time commitment.[18]

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[18] During fiscal years 1989 and 1990, more than 21,000 members of the Federal Reserve and National Guard components, in addition to those enrolled in the AGR Program, served on tours of "active duty for training" of 180 days or more. See *Manpower Requirements Report*, DOD 1991 Fiscal Year, at III-55, IV-55, IV-49, and VI-43, 44; *Manpower Requirements Report*, DOD 1992 Fiscal Year, at II-53, IV-49, 50, V-29, VI-40.

The following is a sample of training tours available during Fiscal Year 1991 that are open to members of the National Guard and Federal Reserve components and that require substantial commitments of time: C-141 Pilot (104 weeks); Officer Sea Air Mariners (104 weeks); Cryptologic Technician Interpreter (79 weeks); C-5 Basic Flight Engineer (53 weeks); Electronic Warfare/Intercept Aviation System Repairer (50 weeks); Hawk (surface to air missile) Field Maintenance Equipment/Pulse Acquisition Radar Repairer (54 weeks); Hawk Firing Section Repairer (36 weeks); Hawk Fire Control Repairer (54 weeks); Medical Equipment Repairer (46 weeks); Fire Controlman (43 weeks); Voice Interceptor (43-90 weeks). See also *Gulf States*, 811 F.2d at 1466 (leave requested under Section 2024(d) to enroll in a one-year training program sponsored by the Army Reserve in response to an acute shortage of nurses); *Eidukonis*, 873 F.2d at 690-692 (leave requested under Section 2024(d) to participate in weapons firing range computer

As the reserve components grew in importance and complexity, it also became clear in the late 1970s that a cadre of "full-time support" personnel was needed to train reserve units and administer the reserve program. After unsatisfactory attempts to answer the full-time training support needs with civilian "military technicians," and because statutory impediments restricted the use of full-time active military personnel to support the Reserves, see *The AGR Program*, 106 Mil. L. Rev. at 9-10, Congress decided to establish the AGR Program in order to supply the necessary full-time training support.[19]

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project); *Kolkhorst* v. *Tilghman*, 897 F.2d at 1285 n.* (citing cases involving training leaves of longer duration).

Reservists ordinarily train in these protracted programs under orders issued on the authority of 10 U.S.C. 672(d), which permits any Reservist to be called to active duty indefinitely with his or her consent. The term "active duty" in Section 672(d) includes "active duty for training" as that term is used in Section 2024(d). See Report of the Committee on the Judiciary, S. Rep. No. 2484, 84th Cong., 2d Sess. 55 (1956).

[19] The Department of Defense Authorization Act of 1980, Pub. L. No. 96-107, Tit. IV, § 401(b), 93 Stat. 807 granted authority to employ a specified number of Reservists "to be serving on full-time active duty for the purpose of organizing, administering, recruiting, instructing, or training the reserve components." See also H.R. Rep. No. 166, 96th Cong., 1st Sess. 121 (1979) ("For the first time * * * there is a seperate [*sic*] authorization for reserve component members serving on full-time active duty for the purposes of organizing, administering, recruiting, instructing, or training the reserve forces.").

Every year since 1980, Congress has continued to reauthorize full-time AGR personnel from components of the Ready Reserves, including the Army and Air National Guard of the United States, and the Army and Air Force Reserve. See

b. The "rule of reason" adopted by the court below, and similar tests adopted by other courts of appeals, jeopardize the reemployment rights of all Reservists serving in the AGR Program or undertaking lengthy periods of training for the benefit of the Reserves. By casting doubt on these Reservists' reemployment rights, the courts' decisions seriously threaten the ability of the Ready Reserve to fill pivotal positions requiring lengthy tours of "active duty for training."

The *ad hoc* and unpredictable nature of the "reasonableness" tests devised by these courts is reflected in the fact that no two tests are alike. See *Kolkhorst* v. *Tilghman*, 897 F.2d at 1285-1286 (noting that the "judicially created [reasonableness] standard" varies "from one jurisdiction to the next"); *Boyle* v. *Burke*, 925 F.2d 497 (1st Cir. 1991) (same). In determining whether a particular form of military leave is "reasonable," the tests vary widely in the factors considered relevant and the weight attached to them. See *e.g.*, *Eidukonis*, 873 F.2d at 695-696 (adopting a broader "reasonableness" inquiry into length of time requested, timing of the request, employee's good faith, the employer's particular need, the employer's ability to find a substitute, the additional costs that

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e.g., Department of Defense Authorization Act of 1984, Pub. L. No. 98-94, § 502, 97 Stat. 631; National Defense Authorization Act of 1991, Pub. L. No. 510, § 412(a), 104 Stat. 1547. As of September 30, 1990, there were almost 33,000 members of the Army and Air National Guard serving tours under 32 U.S.C. 502(f) in the AGR program. See *Biennial Budget Estimate, Fiscal Years 1992-1993, National Guard Personnel Army* at 95, *National Guard Personnel Air Force* at 518. See also Reserve Forces Policy Board, *DOD 1989 Annual Report;* 1A DOD, *Sixth Quadrennial Review of Military Comp.* 3-4 (1988).

would be borne by the employer, and whether the employer had a clear policy regarding leave requests); *Gulf States Paper* v. *Ingram*, 811 F.2d at 1469 (rejecting a "totality test," but holding that "reasonableness" must be judged on the basis of the length of the leave, the employee's actions, and the burden placed on the employer); *Lee* v. *City of Pensacola*, 634 F.2d 886, 889 (5th Cir. 1981) (stating that a "rule of reason" applies, without explaining what factors are to be considered, but examining the Reservist's other training options, the fact that he did not tell his employer about them, the timing of the request, and the burden placed on the employer).[20]

Under such vague standards, no Reservist can be sure if, or how long, his job will be protected, and no employer can know for certain whether it needs to hold a job open or to make other arrangements to comply with the requirements of Section 2024(d). Above all, the military may be unable to attract capable Reservists into its training and full-time support programs once Reservists realize that, absent a judicial decision that is binding in their circuit and that deals with their precise situation, there is no assurance that their jobs will be waiting when the period of service is complete. Reservists fearful of losing their civilian jobs would be effectively deterred from applying for many programs that provide sophisticated training, and the AGR program would

[20] See also *Anthony* v. *Basic American Foods, Inc.*, 600 F. Supp. 352, 355 (N.D. Cal. 1984) (in evaluating whether a leave request is reasonable the court should consider "1) the circumstances giving rise to the request and 2) the requirement of the employer"); *Lemmon* v. *Santa Cruz County*, 686 F. Supp. at 802 (modifying the *Lee* test, to examine five additional factors).

be hard pressed to attract the high caliber personnel it needs.[21] See Army Reg. 135-18, § 1-5 (1985).[22]

In contrast, reading Section 2024(d) to mean what it says yields a concrete, definitive right that an employee can rely upon when deciding whether to enlist in the Ready Reserve and, thereafter, whether to enroll in an extended training program. Both employee and employer will know that as long as the employee's training orders are properly authorized, the employee has the right to return to his job. Thus, this more natural construction of Section 2024(d) supplies

[21] See the Affidavit of Colonel Raymond Albertella, Chief of the Army Manpower Division of the National Guard Bureau, submitted to the district court, in which he attested that "denial of reemployment rights for AGR soldiers would have a significant, adverse impact on the ability of personnel managers to attract quality soldiers, in sufficient numbers required." R1-37-2.

[22] Congress has recently stressed the connection between military preparedness and reemployment rights. In a 1986 Joint Resolution, Congress found that "the National Guard and Reserve forces of the United States are an integral part of the total force policy of the United States for national defense." It further found that "attracting and retaining sufficient numbers of qualified persons to serve in the Guard and Reserve is a difficult challenge" and, consequently, "the support of employers and supervisors in granting employees a leave of absence from their jobs to participate in military training without detriment to earned vacation time, promotions, and job benefits is essential to the maintenance of a strong Guard and Reserve force." Act of May 2, 1986, Pub. L. No. 99-290, § 1(a), 100 Stat. 413. Congress called upon "employers and supervisors of employees who are members of the National Guard or Reserve to abide by the provisions of chapter 43 of title 38, United States Code." Pub. L. No. 99-290, § 1(c), 100 Stat. 413. See also, H.R. Rep. No. 504, 99th Cong., 2d Sess. 2 (1986).

what Congress was seeking in the first instance—reliable job protection that facilitates recruitment of high quality personnel and allows Reservists to be adequately trained to fulfill their critical role in safeguarding our national defense.

B. Nothing In The History Or Evolution Of Section 2024(d) Warrants Departure From Its Terms, Which Unequivocally Protect The Reemployment Rights Of Reservists In Petitioner's Position

1. "Going behind the plain language of a statute in search of a possibly contrary congressional intent is a step to be taken cautiously even under the best of circumstances." *United States* v. *Locke*, 471 U.S. 84, 95-96 (1985) (internal quotes omitted); *Demarest* v. *Manspeaker*, 111 S. Ct. 599, 604 (1991). Here, the statutory text is clear and unambiguous; therefore, "judicial inquiry is complete," and resort to legislative history is unnecessary. *Burlington N.R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987). Even so, we can find nothing in the legislative history of the VRRA generally or of Section 2024(d) in particular that lends any support to a reasonableness test or that warrants an interpretation at odds with the text itself.

As noted above, the provision later recodified at 38 U.S.C. 2024(d) was enacted in 1960 as an amendment to Section 9(g) of the Military Training and Service Act, 50 U.S.C. App. 459 *et seq.* In place of Section 9(g)(3), which granted leaves of absence for the purpose of "performing training duty," see pp. 5 & note 5 *supra*, the 1960 enactment substituted two sections: one (later Section 2024(c)) covered initial active duty training and required return to work within 31 days after release from duty; the other (later Section 2024(d)) covered "active duty for

training or inactive duty training," and required return to work immediately after training. See Act of July 12, 1960, Pub. L. No. 86-632, 74 Stat. 467; H.R. Rep. No. 1263, *supra*, at 8-9 (reprinting old and new law).

This enactment had two principal stated goals, neither of which involved any limitations, durational or otherwise, on leaves of absence under the provision at issue in this case. First, in the provision later codified at 38 U.S.C. 2024(c), the enactment extended to members of the National Guard the same reemployment protection enjoyed by other Reservists who were called to perform "an initial period of active duty for training of 3 to 6 months." S. Rep. No. 1672, 86th Cong., 2d Sess. 1-2 (1960). Second, the enactment was designed to "adjust the time period within which leave of absence rights must be asserted" after the performance of training duty other than initial training covered by Section 2024(c). S. Rep. No. 1672, *supra*, at 1. See also H.R. Rep. No. 1263, *supra*, at 2 (1960). Accordingly, Congress incorporated into the progenitor of Section 2024(d) the requirement that, to qualify for protection, Reservists returning from "active duty for training or inactive duty training" must return to work "at the beginning of the next regularly scheduled working period." H.R. Rep. No. 1263, *supra*, at 2-3. Apart from this requirement, and that of a "request" to the employer for leave, that Section placed no conditions or limits on the assertion of reemployment rights following a tour of duty falling within its scope.

The 1960 Senate Report on Section 2024(d) states that it provides protection for trainees who are absent from employment for short periods, "such as" two-hour drills, weekend drills; two-week annual encampments, or special training or instruction periods

lasting for 30, 60, or 90 days. S. Rep. No. 1672, *supra*, at 2. See also H.R. Rep. No. 1263, *supra*, at 6 (amendments to Section 9(g) provide "job protection and reemployment rights that apply to all military trainees not previously covered"—that is, "individuals on active duty training under orders which contemplate service of less than 3 months and all other training duty, active or inactive, for lesser periods of time"). At least one court of appeals has relied in part on this commentary to construe Section 2024(d) as imposing a requirement that any military leave requested be reasonable. See *Eidukonus* v. *Southeastern Pennsylvania Transp. Auth.*, 873 F.2d at 693. However, these remarks in the legislative history do not support that conclusion. See *Kolkhorst* v. *Tilghman*, 897 F.2d at 1286.

At the time Section 2024(d) was enacted, members of the "Ready Reserve" had only short and intermittent training obligations, such as those described in the Senate Report.[23] The comments in the

[23] The 1960 Senate Report's examples of the range of training duty obligations that existed at that time may have been the source of the Court's dictum in *Monroe* that Section 2024(d) "was enacted in 1960 to deal with problems faced by employees who had military training obligations lasting less than three months." 452 U.S. at 555. Alternatively, this remark may have been based on the terms of a different provision, 38 U.S.C. 2024(c), that protects reservists during their initial active duty for training, which lasts a minimum of 12 weeks. At any rate, *Monroe*'s observation is of limited significance to the interpretation of Section 2024(d), as the statement was made in the course of the Court's ruling on the meaning of an entirely different section of the statute, Section 2021(b)(3). The Court did not discuss, and gave no consideration to, the various types of training falling

congressional reports regarding weekend and two-week training drills therefore simply reflect the range of training requirements in place at the time, and do not impose substantive limitations on the coverage of Section 2024(d). Indeed, a careful examination of the legislative remarks reveals that the instances of existing training obligations supplied in the Reports were designed to illustrate the broad category protected by the new provision—which was to include "all military trainees not previously covered," see H.R. Rep. No. 1263, *supra*, at 6. See, *e.g.*, *Cronin* v. *Police Dep't*, 675 F. Supp. at 850 n.3 (the phrase "such as," used in the Senate Report, "is not a phrase of strict limitation"); *Barber* v. *Gulf Publishing Co.*, 103 Lab. Cas (CCH) ¶ 11,676, at 24,862 n.5 (S.D. Miss. 1986) (determining, on similar analysis, that Section 2024(d) does not exclude training lasting more than 90 days). Thus, Congress's discussion of the training periods prevalent in 1960 does not circumscribe the applicability of Section 2024(d), nor does it prevent the military from adapting to changing needs by creating longer tours of "active duty for training." In any case, the House and Senate Reports provide no support for the existence of a vague and open-ended requirement that the request for leave be "reasonable."

To be sure, most Ready Reservists invoke the protections of Section 2024(d) for periods of training shorter than that involved here—ordinarily, one weekend of inactive duty training per month and 12 days of active duty training per year. But it does not follow that Congress intended Reservists on short-term training to be the *exclusive* beneficiaries. To the contrary, that provision squarely covers less

within the scope of Section 2024(d) that might require significantly longer time commitments.

common, or even unanticipated situations, since it embodies Congress's determination that the Section applies without regard to the length of the leave or other factors that would take away the job security of the reservists who come within its terms.[24] See *Board of Governors* v. *Dimension Fin. Corp.*, 474 U.S. 361, 371 (1986) (Congress's choice of general language demonstrates that, although "legislation may have been prompted by the needs" of specific members of a class, "Congress intended to [cover] the class.").

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[24] The long-standing position of the Secretary of Labor, who administers the VRRA (see 38 U.S.C. 2002A(b)(1), 2025), has been that Section 2024(d) requires an employer to grant leave and to reemploy the Reservist in his previous job when he is released from duty, without any time and reasonableness limitations. See U.S. Dep't of Labor, *Veterans' Reemployment Rights Handbook* 111 (1970). Congress relied upon the Secretary's established interpretation of Section 2024(d) in describing veterans' reemployment rights. See *e.g.*, S. Rep. No. 1477, 90th Cong., 2d Sess. (1968) (containing charts indicating that there is no maximum period of service applicable to "reemployment rights and job protection" for Reservists engaged in "active duty for training or inactive duty training (drills)"); H.R. Rep. No. 1303, 90th Cong., 2d Sess. 6 (1968) (same).

When in 1981, the Secretary temporarily adopted a different view following the Fifth Circuit's decision in *Lee* v. *City of Pensacola*, 634 F.2d 886 (1981), Congress reacted strongly and adopted a joint statement disapproving the Secretary's interpretation. Explanatory Statement of Compromise Agreement, 128 Cong. Rec. 25,513 (1982) (stating that durational limits on protections under Section 2024(d) are not "well-founded either as legislative interpretation or application of the pertinent case law.") The clarification by Congress resulted in the Secretary's reaffirmation of the original interpretation of Section 2024(d):

> [Section 2024(d)] imposes no limit on the number, frequency, or duration of the training duty periods for which the employee has reemployment rights protection. The need for such training is determined by the Armed Forces, and they also determine its frequency and duration. As long as the reservist or Guard member continues to receive the necessary orders, he continues to have statutory protection.

See *Veterans' Reemployment Rights Handbook* 18-2 (1988). See also *Monroe* v. *Standard Oil Co.*, 452 U.S. at 563 n.14 (citing the *Handbook* as authority on the construction of the VRRA); *Leib* v. *Georgia Pacific*, 925 F.2d 240, 245 (8th Cir. 1991), ~~slip op. 10~~ (citing cases holding that the *Veterans' Reemployment Rights Handbook* provides "informed guidance" regarding the VRRA).

2. Even if there were any question as to the intent of Congress when Section 2024(d) was enacted, there can be no doubt that Congress later deliberately extended the benefits of Section 2024(d) to Reservists serving in the AGR program, and did so as part of its emphasis on the importance of that program. In 1980, shortly after creation of the program, Congress amended 38 U.S.C. 2024(f) to provide that "full-time training or other full-time duty performed by a member of the National Guard under section * * * 502 * * * of title 32 is considered active duty for training" under Section 2024(d), and thus is entitled to the reemployment rights guaranteed by that Section. See Veterans' Rehabilitation and Education Amendments of 1980, Pub. L. No. 96-466, § 511(b), 94 Stat. 2207.[25] This amendment unambiguously

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[25] Because AGR personnel do not *receive* training, it was necessary to amend Section 2024(f) to deem AGR service "active duty for training." As explained in the House Report.

> Members of reserve components who are ordered to active duty for training are entitled to be reemployed by their private employers following their releases from that duty. Full-time training or duty by members of

provides that members of the National Guard who, like petitioners, serve in the AGR program on the authority of 32 U.S.C. 502(f), are entitled to the full

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the National Guard under Section 503-505 of title 32, U.S. Code, is treated like active duty for training for this purpose. *It is now possible to perform full-time training or duty under title 32, U.S. Code, section 502 as well as under sections 503-505.* In order to reflect this, section 502 should be added to the enumeration in section 2024(f) of title 38, U.S. Code. *This section would provide the same reemployment rights following periods of full-time training or duty under Title 32, U.S. Code, section 502, as current law provides following duty under Section 503-505 of title 32, U.S. Code.*

H.R. Rep. No. 498, 96th Cong., 1st Sess. 49 (1979) (emphasis added).

The 1980 amendment to Section 2024(f) extended the benefits of Section 2024(d) only to members of the National Guard serving in the AGR under 32 U.S.C. 502(f), because the reemployment rights of other Reservists in the AGR are protected under other provisions of Section 2024. Participants in the AGR Program may be ordered to duty under provisions of Title 32 or Title 10. See, *e.g.*, DOD Appropriation Act of 1980, Pub. L. No. 96-154. Tit. I, 93 Stat. 1141 (authorizing personnel to "serv[e] on active duty under section 672(d) of title 10 or section 502(f) of title 32, United States Code."). Reservists (including some National Guard members) enrolled in the AGR Program under Title 10 are considered to be on "active duty" under either 10 U.S.C. 265 or 10 U.S.C. 672(d), which entitles them to at least four years of reemployment protection under 38 U.S.C. 2024(b)—more than long enough to complete a three-year AGR tour.

Although petitioner was ordered to active duty under 10 U.S.C. 672(d) for a brief period at the beginning of his tour (during which he was required to leave the country), his orders to serve "full-time duty (State) in Active Guard Reserve status" were authorized under 32 U.S.C. 502(f), see Pet. App. 27a-28a, which governs service in the state National Guard. Because he was not called to duty under Title

reemployment protections of Section 2024(d) for the duration of their service. Moreover, in 1984, Congress specified the measure of veterans' rights and benefits available to full-time National Guard members, including those in AGR service,[25] and in doing so reaffirmed that National Guard members serving in the AGR program should receive full reemployment rights under 38 U.S.C. 2024(d).

10, he remained under the command and control of the state Adjutant General, whom he was assigned to assist. See The Active Guard Reserve Program, Army Reg. 135-18, § 3-1 (1985) (National Guard members in the AGR under 32 U.S.C. 502(f) (2) "serve in a state status.").

[26] Because National Guard members in the AGR Program under 32 U.S.C. 502(f) are serving in their state status, see Army Reg. 135-18, § 3-1(c) (1985) and note 25, *supra*, Guard members qualify only for veterans' benefits to the extent that Congress explicitly so provides.

In 1984, Congress once again specified that members of the National Guard on full-time duty, expressly including those serving under 32 U.S.C. 502 (see 32 U.S.C. 101(19) (1984)), are considered to be on "active duty for training" for purposes of reemployment rights. In a provision codified at 10 U.S.C. 3686 (1984), Congress provided that

> for the purposes of law providing benefits for members of the Army National Guard and their dependents and beneficiaries * * * full-time National Guard duty performed by a member of the Army National Guard of the United States shall be deemed to be active duty in the Federal service as a Reserve of the Army, *except that for purposes of Title 38, such duty shall be considered to be active duty for training.*

(emphasis added).

C. The Courts Should Defer To The Decisions Of Congress And The Executive Branch As To Which Tours Should Be Considered "Active Duty For Training" Entitled To Full Reemployment Rights Protection Under Section 2024(d)

As explained in *Monroe* v. *Standard Oil, Inc.*, 452 U.S. at 565, the courts "do[] not sit to draw the most appropriate balance between benefits to employee-reservists and costs to employers. That is the responsibility of Congress." In the present case, Congress has performed that calculus by authorizing full-time support duty in the form of the AGR Program, and by expressly providing that members of the National Guard who undertake such duty shall be considered to be on "active duty for training" entitled to the protections of Section 2024(d). In addition, Congress and the Military have devised new training programs, have decided how long such training programs should last, and have determined how much training is "reasonable." By authorizing new bona fide forms of "active duty for training," the Executive and Legislative Branches have decided that Reservists who undertake such training deserve to have their jobs protected. That should be the end of the matter.

This Court's cases teach that the Judicial Branch should be especially chary of interfering with the exercise of legislative or executive authority over military affairs. See, *e.g.*, *Chappell* v. *Wallace*, 462 U.S. 296, 301 (1983); *Rostker* v. *Goldberg*, 453 U.S. 57, 64-65 (1981). As the Court stated in *Gilligan* v. *Morgan*, 413 U.S. 1 (1973), "[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and

Executive Branches." *Id.* at 10 (emphasis omitted). Thus, the courts should not question the reasonableness of the length or nature of the military leave for training, so long as the leave is supported by properly issued bona fide military orders. See *Cronin* v. *Police Dep't*, 675 F. Supp. at 854 ("the type, duration and frequency of any particular course of military training must also be presumed reasonable").[27]

II. EVEN IF A REASONABLENESS TEST APPLIES, PETITIONER'S REQUEST FOR LEAVE TO SERVE IN THE AGR PROGRAM WAS REASONABLE

To the extent any "reasonableness" rule may be applied to qualify the right conferred by Section 2024(d), we submit that the three-year military leave in the present case was not unreasonable.[28] First, the courts should never deem unreasonable the *duration*

[27] This is not to say that an employee has *carte blanche* to take unlimited and repeated leaves for training, since only leaves that the military deems necessary will be protected. Although some of the training sessions can run successively and others, especially those for highly technical positions, see note 18, *supra*, may be extended for good reason by military authorities, such extensions would end when the Reservist had acquired the necessary skills or when the goals of the training had been met.

[28] The broad question stated in our petition for certiorari and in this brief is whether an employee's right to a leave of absence under Section 2024(d) "is conditioned on the 'reasonableness' of the employee's request for leave," and the discussion in this part of our brief addresses the narrower question whether, if such a condition may *ever* be imposed, the court below properly concluded that the request in this case was unreasonable. We believe, however, that this narrower question is fairly embraced within the more general issue of the existence and scope of any requirement of reasonableness.

of leave to serve pursuant to a bona fide military order. In evaluating reasonableness, the courts should defer to the professional military judgment concerning training and other needs of the Armed Forces, and should presume that the specific orders issued serve the national interest. See *Gilligan* v. *Morgan*, 413 U.S. at 10. Since the district court in this case found that petitioner's military leave request was not "unreasonable" apart from its duration (see Pet. App. 20a-21a), this Court should reverse the decision below.[29]

Second, this Court should defer to the unambiguous and specific congressional judgment that a National Guard member's multi-year tour to serve in the AGR program must be protected under Section 2024(d). As discussed above, p. 8 & note 10, at the time Congress created the AGR Program, the civilian technicians performing support functions were serving three-year tours. See *Lemmon* v. *Santa Cruz County*, 686 F. Supp. at 798. Knowing of these multi-year tours of duty, Congress amended the law to extend to members of the National Guard in the AGR unqualified rights to reemployment under Section 2024(d). Since Congress therefore effectively decided that tours lasting three years fall within the scope of the statute,

[29] In evaluating the effects of granting petitioner a three-year leave, the district court cited the deposition testimony of respondent's vice-president of human resources, explaining that an interim manager filling petitioner's position (manager of the hospital's security department) would not be comfortable enough to work effectively knowing that petitioner could return to the job after three years. Pet. App. 21a-22a n.9. However, the court's assessment of adverse impact on the employer should not be permitted to outweigh the military's determination as to the appropriate length of service in a Reserve position.

petitioner's three-year leave request should not be considered unreasonable.

Finally, three years is not an unreasonably long period for VRRA protection. A person who volunteers for regular military service is covered by the VRRA (without any qualifications) for four years, with extensions to five years or longer under certain circumstances. See 38 U.S.C. 2024(a). Moreover, members of the National Guard and the Federal Reserve components serving in the AGR program in a purely federal capacity under Title 10 U.S.C. are guaranteed reemployment rights for at least four years under 38 U.S.C. 2024(b). See note 25, *supra*. Reading a durational limit of less than three years into Section 2024(d), as did the court of appeals here, would create the anomaly of providing full job protection for Reservists serving in the AGR program under Title 10, but according no protection whatever to members of the National Guard performing the same functions on orders issued under Title 32. It is difficult to believe that Congress could have intended such drastically different treatment for members of different reserve components playing the same role. If some Reservists in the AGR program are covered for at least four years, it cannot be unreasonable to provide job protection for a member of the National Guard serving in the AGR program for three years.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Section 502 (32 U.S.C.) (1988) provides, in pertinent part as follows:

> Required drills and field exercises
>
> * * * * *
>
> (f) Under regulations to be prescribed by the Secretary of the Army or Secretary of the Air Force, as the case may be, a member of the National Guard may—
>
> (1) without his consent, but with the pay and allowances provided by law; or
>
> (2) with his consent, either with or without pay and allowances;
>
> be ordered to perform training or other duty in addition to that prescribed under subsection (a). Duty without pay shall be considered for all purposes as if it were duty with pay.

Section 2024 (38 U.S.C.) (1988) of the Veterans' Reemployment Rights Act provides as follows:

> Rights of persons who enlist or are called to active duty; Reserves
>
> (a) Any person who, after entering the employment on the basis of which such person claims restoration or reemployment, enlists in the Armed Forces of the United States (other than in a Reserve component) shall be entitled upon release from service under honorable conditions to all of the reemployment rights and other benefits provided for by this section in the case of persons inducted under the provisions of the Military Selective Service Act (or prior or

subsequent legislation providing for the involuntary induction of persons into the Armed Forces), if the total of such person's service performed between June 24, 1948, and August 1, 1961, did not exceed four years, and the total of any service, additional or otherwise, performed by such person after August 1, 1961, does not exceed five years, and if the service in excess of four years after August 1, 1961, is at the request and for the convenience of the Federal Government (plus in each case any period of additional service imposed pursuant to law).

(b)(1) Any person who, after entering the employment on the basis of which such person claims restoration or reemployment, enters upon active duty (other than for the purpose of determining physical fitness and other than for training), whether or not voluntarily, in the Armed Forces of the United States or the Public Health Service in response to an order or call to active duty shall, upon such person's relief from active duty under honorable conditions, be entitled to all of the reemployment rights and benefits provided for by this chapter in the case of persons inducted under the provisions of the Military Selective Service Act (or prior, or subsequent legislation providing for the involuntary induction of persons into the Armed Forces), if the total of such active duty performed between June 24, 1948, and August 1, 1961, did not exceed four years, and the total of any such active duty, additional or otherwise, performed after August 1, 1961, does not exceed four years (plus in each case any additional period in which such person was unable to obtain orders relieving such person from active duty).

(2) Any member of a Reserve component of the Armed Forces of the United States who voluntarily or involuntarily enters upon active duty (other than for the purpose of determining physical fitness and other than for training) or whose active duty is voluntarily or involuntarily extended during a period when the President is authorized to order units of the Ready Reserve or members of a Reserve component to active duty shall have the service limitation governing eligibility for reemployment rights under subsection (b)(1) of this section extended by such member's period of such active duty, but not to exceed that period of active duty to which the President is authorized to order units of the Ready Reserve or members of a Reserve component. With respect to a member who voluntarily enters upon active duty or whose active duty is voluntarily extended, the provisions of this subsection shall apply only when such additional active duty is at the request and for the convenience of the Federal Government.

(c) Any member of a Reserve component of the Armed Forces of the United States who is ordered to an initial period of active duty for training of not less than twelve consecutive weeks shall, upon application for reemployment within thirty-one days after (1) such member's release from such active duty for training after satisfactory service, or (2) such member's discharge from hospitalization incident to such active duty for training, or one year after such member's scheduled release from such training, whichever is earlier, be entitled to all reemployment rights and benefits provided by this chapter for persons inducted under the provisions of the Military Selective Service Act (or prior or

subsequent legislation providing for the involuntary induction of persons into the Armed Forces), except that (A) any person restored to or employed in a position in accordance with the provisions of this subsection shall not be discharged from such position without cause within six months after that restoration, and (B) no reemployment rights granted by this subsection shall entitle any person to retention, preference, or displacement rights over any veteran with a superior claim under those provisions of title 5 relating to veterans and other preference eligibles.

(d) Any employee not covered by subsection (c) of this section who holds a position described in clause (A) or (B) of section 2021(a) shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training, or upon such employee's discharge from hospitalization incident to that training, such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes. Such employee shall report for work at the beginning of the next regularly scheduled working period after expiration of the last calendar day necessary to travel from the place of training to the place of employment following such employee's release, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control. Failure to report for work at such next regularly sched-

uled working period shall make the employee subject to the conduct rules of the employer pertaining to explanations and discipline with respect to absence from scheduled work. If such an employee is hospitalized incident to active duty for training or inactive duty training, such employee shall be required to report for work at the beginning of the next regularly scheduled work period after expiration of the time necessary to travel from the place of discharge from hospitalization to the place of employment, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control, or within one year after such employee's release from active duty for training or inactive duty training, whichever is earlier. If an employee covered by this subsection is not qualified to perform the duties of such employee's position by reason of disability sustained during active duty for training or inactive duty training, but is qualified to perform the duties of any other position in the employ of the employer or such employer's successor in interest, such employee shall be offered employment and, if such person so requests, be employed by that employer or such employer's successor in interest in such other position the duties of which such employee is qualified to perform as will provide such employee like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such employee's case.

(e) Any employee not covered by subsection (c) of this section who holds a position, described in clause (A) or (B) of section 2021(a) shall be considered as having been on leave of absence during the period required to report for the purpose of being inducted into, entering, or

determining, by a preinduction or other examination, physical fitness to enter the Armed Forces. Upon such employee's rejection, upon completion of such employee's preinduction or other examination, or upon such employee's discharge from hospitalization incident to such rejection or examination, such employee shall be permitted to return to such employee's position in accordance with the provisions of subsection (d) of this section.

(f) For the purposes of subsection (c) and (d) of this section, full-time training or other full-time duty performed by a member of the National Guard under section 316, 502, 503, 504, or 505 of title 32 is considered active duty for training. For the purposes of subsection (d) of this section, inactive duty training performed by that member under section 502 of title 32 or section 206, 301, 309, 402, or 1002 of title 37 is considered inactive duty training.

(g) Any member of a Reserve component of the Armed Forces of the United States who is ordered to active duty for not more than 90 days under section 673b of title 10, United States Code, whether or not voluntarily, shall be entitled to all reemployment rights and benefits provided under subsection (c) of this section for persons ordered to an initial period of active duty for training of not less than twelve consecutive weeks; and shall have the service limitation governing eligibility for reemployment rights under subsections (a) and (b)(1) of this section extended by the period of such active duty.

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QUESTIONS PRESENTED

I. Whether 38 U.S.C. § 2024(d) was designed to provide employees short leaves of absence from their civilian employment for service as National Guard members at weekend drills, two week annual encampments, and special training or instruction periods lasting thirty, sixty or ninety days.

II. Whether leaves of absence under 38 U.S.C. § 2024(d) are governed by reasonableness.

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STATEMENT OF THE CASE

1. The question in this case is whether petitioner is entitled to a leave of absence from his civilian job to serve for three years in the National Guard.

Petitioner, William "Sky" King, was employed by the Hospital on September 24, 1979 as manager of its security department where he supervised twenty-one employees including three supervisors. King advised the Hospital on many matters pertaining to the safety and welfare of its employees and patients.

King's position with the Hospital included high profile public relations involving daily contact with the Hospital's patients, employees, the general public, and the Hospital's professional staff of doctors.

When he sought a leave of absence, King had been a member of the Alabama National Guard for thirty-five years. While employed with the Hospital, he served on numerous tours of training, some of which were military leaves of absence.

In June, 1987, while King was on his mandated two-week summer camp with the National Guard, he applied to become the State Command Sergeant Major for the Alabama National Guard. King was aware that the position he sought required a full-time, three-year commitment. However, when King returned from his leave in late June he did not advise the Hospital of his application. King did telephone the Veterans Reemployment Rights office in Atlanta, Georgia, and was advised that he was entitled to serve up to four years on "active duty" and have reemployment rights upon his return. King made this inquiry to the Veterans Reemployment Rights Office before learning on Saturday, July 18, 1987, that he had been selected for the position.

After King accepted the appointment, he informed the Hospital that he would be taking the National Guard position.

King looked upon the position of State Command Sergeant Major with respect and felt honored to be considered and chosen for this position. King's last day of work at the Hospital was August 14, 1987 and he began his duties with the National Guard in Montgomery, Alabama on August 17, 1987.

On September 8, 1987, the Hospital, after receiving advice of counsel, advised King of its decision to deny his leave request on the basis that it did not qualify under the provisions of the Veterans Reemployment Rights Act and that King's request for such a lengthy period of leave time was unreasonable (R.15-19).

2. The Court of Appeals for the Eleventh Circuit found that King was not entitled to a three-year leave of absence under 38 U.S.C. § 2024(d) since to grant him a leave for such a duration was *per se* unreasonable and unreasonable as a matter of fact.

3. King's orders were issued pursuant to 32 U.S.C. § 502(f). The parties stipulated that whatever leave of absence rights King may have would flow to him pursuant to § 2024(d) by virtue of his status as a member of the National Guard engaged in "active duty for training."

4. The Solicitor on behalf of King claims that King is entitled to a three-year leave of absence under 38 U.S.C. § 2024(d) since leaves of absence under § 2024(d) are unlimited in duration. The Hospital contends that leaves pursuant to § 2024(d) are limited to short periods of time such as weekend drills, two-week summer camps, and other activity of 30, 60 or 90 days. Contrary to the Solicitor, the Hospital claims that the "reasonableness test" is an appropriate aid to judicial interpretation, except that a leave of three years is too long to escape the *per se* rule imposed by the Eleventh Circuit. The position of the Hospital is supported by the language of § 2024, its context in the broader law, and its purpose and legislative history. For these reasons, and in the absence of strict durational limitations in the statute, the Eleventh Circuit appropriately applied the "reasonableness test" in support of the will of Congress.

5. There have been no substantive amendments to § 2024(d) since its enactment in 1960. While the Solicitor claims that a structural or technical amendment to § 2024(f) erased the legislative intent accompanying the enactment of § 2024(d), there is no support for this position as there is no support for the further position that a 1964 amendment to 32 U.S.C. § 502 in the form of adding § 502(f) changed the leave entitlement under § 2024(d).

SUMMARY OF ARGUMENT

Title 38 U.S.C. § 2024(d) was enacted to provide employment rights and benefits to its employees for the purpose of participating in weekly drills, two-week annual summer camps, and other training or instruction periods of short duration. The intent of Congress is revealed by the words used in the statutes, especially when compared with the provisions used to provide rights and benefits to veterans returning to work after serving on active duty or initial active duty for training. Employee status is not broken when an employee serves on National Guard duty referred to in 38 U.S.C. § 2024(d) as "active duty for training," but, as stated in the statute, such an employee is required to return to work "at the beginning of the next regularly scheduled working period." These provisions show that an employee engaged in active or inactive duty for training is expected to be absent for only short durations and certainly not for a three-year period.

Congress has provided that these persons would be entitled to leaves of absence rather than reemployment as is the case

after a period of active duty which is further indication that leaves pursuant to § 2024(d) are limited in duration.

The purpose and the history of § 2024(d) clearly establishes member-employees were provided protection solely for the purpose of leaving their full-time civilian jobs and participating as part-time soldiers for short, annual periods.

Those parts of § 2024(d) that indicate it was only applicable to short-term leaves of absenee are the parts that would render it unreasonable if applied to leaves of extended duration. The leaves of absence concept, as an example, is a concept not ordinarily applied to periods of three-years or longer. The same applies to the concept of an immediate return to work following such a lengthy leave. Also, it is unreasonable to expect an employer to return an employee to the precise job the employee left three-years earlier, especially where, unlike the other components of §§ 2021 and 2024, the return is without regard to the qualifications of the employee to perform the job after an extended leave. It is unreasonable to expect an employer to return an employee to work after a week-end or two-week summer leave on the same terms as an employee who has been gone for an extended period of time.

The breaking point between short-term and long-term leaves appears to be the minimum twelve-week period required under § 2024(c) before the reemployment rights of § 2021(a)(B) are applicable and those periods less than twelve weeks when the leave of absence rights in § 2024(d) are applicable. In the absence of an expression of duration in § 2024(d), the courts below, to avoid the unreasonable and unintended results of long-term leaves, applied the rule of reason.

In so doing, the court found that a three-year leave was so far removed from the statute's scope and coverage that it would be *per se* unreasonable to submit it to the balancing

test of reasonableness. The Court also found the requested three-year leave request, in fact, unreasonable based essentially upon the extended leave request by a member of the Hospital's Management without regard for the interim needs of the Hospital. In reaching the result, the Eleventh Circuit implicitly found that a construction of § 2024(d) giving a National Guard person rights and benefits beyond those provided to active duty persons would be unreasonable.

There has not been an amendment to § 2024(d) since its enactment and the 1964 amendment to 32 U.S.C. § 502 did not expand the rights protected by § 2024(d) even though Congress in 1980, amended § 2024(f) by making some of the activity embraced by § 502 "active duty for training" where it had previously been labeled, "inactive duty training" in § 2024(f). The rights afforded a National Guard person pursuant to § 2024(d) are the same whether the leave is for the purpose of attending a week-end drill or participating in training or instruction periods of 30, 60 or 90 days.

ARGUMENT

I. 38 U.S.C. § 2024(d) WAS DESIGNED TO PROVIDE EMPLOYEES SHORT LEAVES OF ABSENCE FROM THEIR EMPLOYMENT FOR SERVICE AS NATIONAL GUARD MEMBERS AT WEEKEND DRILLS, TWO WEEK ANNUAL ENCAMPMENTS, AND SPECIAL TRAINING OR INSTRUCTION PERIODS LASTING THIRTY, SIXTY, OR NINETY DAYS.

Since 1940 Congress has provided reemployment rights to veterans. "He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946); *see also Monroe v. Standard Oil*

Co., 452 U.S. 549, 554-56 (1981). Presently codified at 38 U.S.C. §§ 2021-2026, these statutory rights are contained in the Vietnam Era Veteran's Readjustment Assistance Act of 1974 (hereinafter "Act").[1] The Act is designed to protect the employment rights of persons who are inducted into active duty military service,[2] those who enlist and serve on active duty,[3] those who are ordered or called to active duty,[4] those who serve an initial period of active duty for training,[5] and employees who are members of the Reserves or National Guard and who need leaves of absence from their employers to participate in military training.[6]

A. *Policy or wisdom of particular interpretation should be addressed to legislators.*

The Solicitor, on behalf of William "Sky" King, correctly states the "question in this case" as whether King is entitled under 38 U.S.C. § 2024(d) to a three-year leave of absence from his employment as the Protective Services Manager at St. Vincent's Hospital to serve as State Command Sergeant Major in the Alabama National Guard. Analysis of this question, however, does not, "require[] consideration of the role of the National Guard and the Reserve forces" in our national defense. Brief of Petitioner at 2.[7] Rather, the answer to this

[1]Pub. L. No. 93-508, §§ 2021-2026, 88 Stat. 1578 (1974).
[2]38 U.S.C. § 2021.
[3]38 U.S.C. § 2024(a).
[4]38 U.S.C. § 2024(b).
[5]38 U.S.C. § 2024(c).
[6]38 U.S.C. § 2024(d).
[7]The Solicitor stresses the role of the National Guard in the broad scheme of our National defense and urges that a durational limit on leaves of absence under 2024(d) "hobbles the Nation's ability to recruit Reservists . . . . As a result, the readiness and integrity of the Reserve components, and of the Armed Forces as a whole, is compromised." Brief of Petitioner at 13. For example, the Solicitor argues that "[c]hanges in defense policy within the last generation have dramatically transformed the role of the Reserve components . . . [and that] significant curtailment of the protections afforded Reservists under Section 2024(d) would have an especially adverse impact on military preparedness." Brief of Petitioner at 20. Arguments which on their face relate only to the policy or wisdom of a particular interpretation are more appropriately addressed to legislators or administrators, not to judges. *See Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194-95 (1978).

question lies in the language of the statute and the purpose Congress sought to accomplish through its enactment.[8]

B. *The core issue involves interpretation of the language used in 38 U.S.C. § 2024(d), 32 U.S.C. 502(f), a 1980 amendment to 38 U.S.C. 2024(f), and the history and purpose of these enactments.*

The parties in this case disagree over the language and legislative history of 38 U.S.C. § 2024(d) and 32 U.S.C. § 502. There appears to be partial agreement with regard to

[8]The language employed in the statute is the foremost guide to legislative intent. *See United States v. Rutherford*, 442 U.S. 544, 551 (1979). Nevertheless, statutory language is rarely so clear that the legislative purpose or history is totally irrelevant. The Court is not limited to the bare literal words of a statute and will look at all indicia of legislative intent. *Cass v. United States*, 417 U.S. 72, 77-79 (1974); *United States v. American Trucking Ass'n, Inc.*, 310 U.S. 534, 543-44 (1940); *United States v. Dickerson*, 310 U.S. 554, 562 (1940); *see also Norfolk Redevelopment and Housing Auth. v. Chesapeake and Potomac Tel. Co.*, 464 U.S. 30, 34 (1983) ("Our analysis of the statute and its legislative history convinces us that in passing the Relocation Act Congress addressed the needs of residential and business tenants and owners, and did not deal with the separate problem posed by the relocation of utility service lines."); *United States v. N.E. Rosenblum Truck Lines, Inc.*, 315 U.S. 50, 55 (1942) ("where the plain meaning of words used in a statute produces an unreasonable result, 'plainly at variance with the policy of the legislation as a whole, we may follow the purpose of the statute rather than the literal words"); *United States v. Stone and Downer Co.*, 274 U.S. 225, 252 (1927) ("In other words, the pole star of interpretation of statutes . . . must be the intention of Congress when that can be clearly ascertained and is reasonably borne out by the language used."). *United States v. Fisher*, 2 Cranch 358, 386 (1805) (Marshall, C.J.) ("Where the mind labours to discover the design of the legislature, it seizes everything from which that can be derived. . .").

the "whole law," but disagreement dominates when § 2024(d) is considered as a component of the whole law. Dramatic differences exist as to the "purpose" of § 2024(d). In sum, and with great simplicity, the Solicitor argues that, under § 2024(d), King is entitled to "a leave of absence . . . for the period required to perform active duty for training" and that the "period required" flows directly from § 502(f) by virtue of the words "training and other duty." However, a proper analysis reveals that § 2024(d) was designed for leaves of short-term duration covering National Guard "employees" in the bottom category[9] of employment rights, described by Congress as "active duty for training" and "inactive duty training."

There is at least one area of agreement: the Solicitor concedes that § 2024(d) was enacted at a time when there were only "short and intermittent training obligations." He argues, however, that the legislative intent at the time of enactment "simply reflect[s] the range of training requirements in place at the time" but does not preclude "creating longer tours of 'active duty for training.'" Brief of Petitioner at 30-31. Such an interpretation is absolutely contrary to the legislative intent underlying the amendment of 32 U.S.C. § 502 to add subsection (f),[10] particularly the examples used to convey the intended limitations.[11] Moreover, and in concrete terms, the enactment stated it was "not intended to encourage any additional training with pay" or "to encourage any additional drill pay periods."[12]

[9]"Bottom" in this regard refers to that category where the needs of the employee are less than anywhere else in the statute and the detriment to the employer is more limited than the other categories. King, on the other hand, contends that § 2024(d), occupies the "top" category. Of course, King also claims that § 2024(d) covers the bottom as well as the top.

[10]Act of Oct. 3, 1964, Pub. L. No. 88-621, § 1(1), 78 Stat. 999 (1964), discussed *infra*.

[11]S. Rep. No. 1584, 88th Cong., 2d Sess. *reprinted in* 1964 U.S. Code Cong. & Admin. News 3800-3802.

The Solicitor contends that § 2024(d) permits unlimited leaves of absence and allows an employee "to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent . . . . " upon the completion of that employee's military service. 38 U.S.C. § 2024(d).[13] The interpretation urged by the Solicitor, however, is not only inconsistent with the legislative history of § 2024(d), discussed *infra*, but such interpretation offends the purpose of and words used in subsection (d), discussed *infra*.

1. *The language of 38 U.S.C. § 2024(d) shows that Congress enacted it to provide employees with short term leaves of absence from their employment to serve as members of the National Guard.*

"The 'plain purpose' of legislation . . . is determined in the first instance with reference to the plain language of the statute itself." *Board of Governors of the Federal Reserve System v. Dimension Fin. Corp.*, 474 U.S. 361, 373 (1986). Section 2024(d) provides in pertinent part:

> Any employee . . . shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training . . . . Upon such employee's release from a period of such active duty for training or inactive duty training . . . such employee shall be permitted to return to such

[12]*Id.* at 3801.

[13]The Army Guard Reserve Program provides for periods of active duty of up to five years and these periods of active duty may be renewed upon completion. 10 U.S.C. § 679(a).

> employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent . . . . Such employee shall report for work at the beginning of the next regularly scheduled working period . . . following such employee's release . . . .

38 U.S.C. § 2024(d).

Subsection (d) is replete with the term "employee." No other subsection in either § 2021 or § 2024 refers to the class of person protected as "employees."[14] Section 2021 applies to "any person . . . inducted . . . ." 38 U.S.C. § 2024(a) and (b)(1) address the protection afforded to "any person who . . . enlists" or "enters upon active duty." 38 U.S.C. § 2024(b)(2) and (c) address the protection afforded to "any member of a Reserve component." The words used in § 2024(d) thus suggest a continuing employment relationship during a "leave of absence" to perform training in the Reserves or National Guard. The continuing employment relationship belies the Solicitor's argument that leaves of unlimited duration are allowed under § 2024(d).[15] Leaves of unlimited duration are inconsistent with a continuing employment relationship.[16]

That the provision was intended to protect only short leaves is supported by § 2024(d)'s mandate that the employee be "*return[ed]* to such employee's position with such seniority, status, pay and vacation as such employee would have had if such employee had not been absent . . . ." Every other subsection requires that "any person" or "member" be *restored* to such position *or to a like position*.[17] Applying its common meaning, "restore" implies that employment is to be reestablished, renewed, or revived, that the person or member is to be reinstated to "such position or to a position of like seniority, status, and pay." If the person is reinstated, the employment relationship was at some point terminated. Just as the word "employee" suggests continuing employment, however, the word "return" infers only a short absence from work. This interpretation is further buttressed by the fact that,

[14]38 U.S.C. § 2024(e) also provides leave of absence protection to "[a]ny *employee* not covered by subsection (c) . . . during the period required to report for the purpose of being inducted into, entering, or determining, by a preinduction or other examination, physical fitness to enter the Armed Forces." Subsection (e) provides that the "employee" upon rejection or upon completion of the examination "shall be permitted to return to such employee's position in accordance with the provisions of subsection (d) . . . ." (emphasis added).

[15]Because reservists may serve for periods of active duty up to five years and these periods of active duty may be renewed, 10 U.S.C. § 679(a), a reservist, under the Solicitor's view, could conceivably obtain leaves from his civilian employment for four five-year tours, retire, and then expect to return to his civilian employment twenty years later "with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes." 38 U.S.C. § 2024(d).

[16]This Court has previously recognized that the word employee is difficult to define making resort to the legislative history appropriate. *United States v. American Trucking Ass'n, Inc.*, 310 U.S. 534, 545 (1940) ("The word, of course, is not a word of art. It takes color from its surroundings and frequently is carefully defined by the statute where it appears.")

[17]Those persons who enlist, who enter active duty in response to a call, and members of the Reserves who serve an "initial period of active duty not less than twelve consecutive weeks" are limited to the "reemployment rights and benefits provided . . . for persons inducted . . . ." 38 U.S.C. § 2024(a) (b) and (c) (exceptions apply to length of service which is not to exceed four years unless "unable to obtain orders relieving such person from active duty"). Under 38 U.S.C. § 2021, persons inducted are to "be *restored* . . . to such position or to a position of like seniority, status, and pay; . . . unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so." 38 U.S.C. § 2021(a)(B) (emphasis added). For those whose protection falls under § 2024(a) through (c), the employer is relieved of any obligation to reemploy at any position if "the employer's circumstances have so changed as to make it impossible or unreasonable to do so." 38 U.S.C. § 2021(a)(B). There is no such relief afforded employers under § 2024(d) and the statute mandates the employee be returned.

under § 2024(d), all the employee must do is "report" for work; whereas, every other "person" or "member" must make "application for reemployment." "Application for reemployment" clearly demonstrates that the employment relationship was severed.[18] The words "employee," "return" and "report" as opposed to "person," "member," "restore" and "application for reemployment" signal the scope of the limited rights granted under § 2024(d).

Accordingly, § 2024(d) can apply only to leaves of short duration because it mandates that the employee "shall report for work at the beginning of the next regularly scheduled working period . . . ." If the employee is away from his or her civilian employment for a (three-six-or ten-year period), it is impractical to expect such an employee to report for work at the next regularly scheduled shift.[19] It is unreasonable to expect an employer to "calendar" the return of an employee after a lengthy, three-year, leave of absence with such great precision. Read literally, the employee would simply have to "show up" for work. This, to anyone who has ever met a payroll, is a strange concept where a prolonged absence is involved. Section 2021 and the other subsections of § 2024 which contemplate extended absences avoid this problem by giving the employee time to "apply" for

[18]This Court has previously held that "[a] furlough is not considered a discharge. It is a form of lay-off. So is a leave of absence." *Fishgold v. Sullivan Drydock Repair Corp.*, 328 U.S. 275, 287 (1946). And the consequences of either a furlough or leave of absence "are quite different from terminations of the employment relationship .... An employee on furlough or on leave of absence has a continuing relationship with the employer; he retains the right to be restored to work under specified conditions." *Id.*

[19]An employee who fails to report to work at the next regularly scheduled working period can lawfully be terminated if the employer's "conduct rules . . . pertaining to explanations and discipline with respect to absence from scheduled work" allow such. 38 U.S.C. § 2024(d).

reemployment and the employer time to find work for the employee to perform.[20]

Also consistent with leaves of short duration, and inconsistent with lengthy leaves, is § 2024(d)'s requirement that the employee be returned to "such employee's position." Compare this to persons protected pursuant to § 2021(a)(B), who are to be granted their former positions or a "like position" only "if still qualified." The rights and benefits of every other class are also contingent upon changed "employer's circumstances" which may render it "impossible or unreasonable" to reemploy the person. Read literally, the return provision in § 2024(d) would preclude an employer from permanently filling a position during a three-year or longer leave of absence because the employee must be returned to his or her former position. Unresolved questions that would occur under the Solicitor's proposed application of § 2024(d) include whether the employer could abolish that position during the leave and, if so, the rights, if any, the employee would have to a redefined or "like" position upon return. The statute does not address the obligations the employer would owe an employee whose position has been abolished or redefined. It is unlikely that these problems would occur during leaves of short duration. The converse is true where long-term leaves are involved.

[20]For example, § 2024(c) allows a member of a Reserve unit returning from an initial period of training to make application for reemployment "within thirty-one days after . . . release from . . . active duty . . . ." Persons protected under § 2021 and under § 2024(a) and (b) are entitled to make "application for reemployment within ninety days after such person is relieved from training or service . . . ." 38 U.S.C. § 2021(a). This period of time within which to apply for reemployment assists the veteran because "[h]e is not pressed for a decision immediately on his discharge but has the opportunity to make plans for the future and readjust himself to civilian life." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946).

Finally, the lack of job protection provided under § 2024(d) upon return also indicates that Congress contemplated only short leaves of absence thereunder; whereas it clearly anticipated lengthier service under other provisions of the Act. Section 2024(c) provides that a person "shall not be discharged . . . without cause within six months after that restoration." Section 2021 and § 2024(a) and (b) provide that the person "shall not be discharged from such position without cause within one year after restoration or reemployment." 38 U.S.C. § 2021(b)(1). The initial period of active duty for training protected by § 2024(c) has a minimum floor of twelve weeks and a typical maximum of six months. One can infer that the shorter period of active duty envisioned by § 2024(c) is the reason why its post-return protection is less than the post-return protection afforded those covered by §§ 2021 and 2024(a) and (b). Also, since leaves under § 2024(d) were intended to be of short duration, Congress simply created a continuing "employee" status without any post-return protection.

Beyond this, by enacting 38 U.S.C. § 2024(d), Congress intended to create a protected class of employees engaged in "active duty for training" and "inactive duty training." While the words used to describe these activities have no common meanings, the words discussed above, such as "employee," return," "such position," "leave-of-absence," "report," and "next regularly scheduled working period" are words that do have common meanings and are more appropriately applicable to short-term absences than to long-term absences. The Solicitor's proposed interpretation does not recognize that the special words used in § 2024(d) have meanings separate and apart from the words used in § 2021 and other subsections of § 2024.

2. *The context of 38 U.S.C. § 2024(d) in the body of the law as a whole shows that the enactment was to provide only short-term leaves of absence.*

The Solicitor also does not analyze the provisions of § 2024(d) against the backdrop of the "whole law."[21] The body of statutory law governing this area provides rights, in descending order of importance, to those on active duty; either inductees, enlistees, or persons ordered or called to active duty.[22] The law then grants employment rights to persons engaged in an "initial" period of "active duty for training."[23] Finally, in § 2024(d), Congress provides rights to those involved in training, other than the "initial period," referred to as "active duty for training" and "inactive duty training." It is exclusively this latter "member"[24] the Solicitor contends is deserving of leaves of unlimited duration. Looking at the statute in context, however, it is impossible to believe that Congress intended to grant greater rights to those involved in

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[21] "On a pure question of statutory construction, our first job is to try to determine Congressional intent, using traditional tools of statutory construction." *NLRB v. Food & Commercial Workers*, 484 U.S. 112, 123, 108 S.Ct. 413, 421, 98 L.Ed.2d 429 (1987). Our "starting point is the language of the statute," *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 5, 105 S.Ct. 2458, 2461, 86 L.Ed.2d 1 (1985), but "'in expounding a statute, we are not guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *Massachusetts v. Morash*, 490 U.S. 107, ___, 109 S.Ct. 1668, 1673, 104 L.Ed.2d 98 (1989), quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51, 107 S.Ct. 1549, 1555, 95 L.Ed.2d 39 (1987). *See also K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 1817, 100 C.Ed.2d 313 (1988) (same).

Dole v. United Steelworkers of America, 494 U.S. 26, __, 110 S. Ct. 929, 934 (1990).

[22] 38 U.S.C. § 2021 (inductees); 38 U.S.C. § 2024(a) (enlistees); and 38 U.S.C. § 2024(b) (those called or ordered).

[23] 38 U.S.C. § 2024(c).

[24] See footnote 20, *infra*.

"active duty for training" and "inactive duty training" than it granted to persons engaged in "active duty."

Rather, it is evident that Congress established a scheme of employment protection balancing the employees' needs against the impact on the employer. In every category or class, except inductees, Congress weighed the need of the employee against the burden on the employer and established durational limits. Congress determined that the reemployment protection for those persons inducted overrode any burden placed on the employer and set no durational limits on an inductee's reemployment rights, probably because he occupied an involuntary status.[25] Congress placed a durational limit of four years on the reemployment rights of those who enlist, with an additional year of protection if additional service is at the request and for the convenience of the Federal Government.[26] Those persons entering active duty in response to an order or call were also limited to four years of protection, plus any additional period for which such person was unable to obtain orders relieving him or her from active duty.[27] Finally, members of the Reserves were given the same reemployment protection as those entering in response to an order or call, "not to exceed that period . . . which the President is authorized to order . . ." and only if service is "at the request and for the convenience of the Federal Government."[28] That only short-term leaves were contemplated by Congress under § 2024(d) is demonstrated by the placement of these leaves at the bottom of the employment rights scheme. "Employees" entitled to rights under § 2024(d) are expected to be part-time soldiers and full-time civilian employees. If granted the right to extended leaves of absence of

[25]38 U.S.C. § 2021.
[26]38 U.S.C. § 2024(a).
[27]38 U.S.C. § 2024(b)(1).
[28]38 U.S.C. § 2024(b)(2).

three years or more, the identity of the true employer will shift to the military.

The interpretation of § 2024(d) urged by the Solicitor does not fall within hierarchical scheme of protection afforded by the law, but instead focuses upon the "new" scheme of national defense and the program referred to as "AGR." In proposing this interpretation, however, the Solicitor has failed to note that Congress has not changed § 2024(d) since its original enactment in 1960[29] as an amendment to the Universal Military Training and Service Act.[30] At that time there was no "AGR" nor had 32 U.S.C. § 502(f), as discussed *infra*, been enacted.

3. *The legislative history and purpose of 38 U.S.C. § 2024(d) clearly show that it was enacted to allow leaves of absence for military training obligations lasting less than three months.*

The interpretation of the legislative history of § 2024(d) is another area of glaring difference between the parties. In the Hospital's view, the purpose of the legislation is clear and unequivocal.[31] The stated maximum leave of not over 90 days,[32] the reference to leaves of "short duration,"[33] and the

[29]Act of July 12, 1960, Pub. L. No. 86-632, § 1, 74 Stat. 467 (1960); S. Rep. No. 1672, 86th Cong., 2d Sess., *reprinted in* 1960 U.S. Code Cong. & Admin. News 3077, 3078-79.
[30]Pub. L. No. 82-51, 82 Stat. _, (1951).
[31]"This section was designed to provide reemployment protection for trainees . . . for only a short period of time, such as 2-hour drills, weekend drills, 2-week annual encampments, and special training or instruction periods that may last for 30, 60, or 90 days." S. Rep. No. 1672, 86th Cong., 2d Sess. *reprinted in* 1960 U.S. Code Cong. & Admin. News 3077, 3078; *see also* H.R. Rep. No. 1263, 86th Cong., 2d Sess. 6 (1960) ("those individuals on active duty training under orders which contemplate service of less than 3 months and all other training . . . for lesser periods of time are covered by this section").
[32]*See supra* note 31.
[33]*See supra* note 31.

coverage for leaves of "lesser periods of time"[34] creates no doubt that leaves of absence under § 2024(d) are indeed limited in duration. The Solicitor's claim that the purpose of § 2024(d) was "broad;" that it included only a description of the training opportunities then offered; and that the purpose did not "prevent the military from . . . creating longer tours of active duty for training"[35] is simply not supported by the will of Congress.[36] It is a long jump from 30, 60, or 90 days[37] to a leave of 1095 days which is subject to further extensions. The purpose of the enactment would be completely changed if this jump were made. The intent of the enactment would be destroyed.

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[34]*See supra* note 31.

[35]Brief of Petitioner at 30-31.

[36]The provision in § 2024(d) requiring a covered employee on leave to "report for work at the beginning of his next regularly scheduled working period" was originally enacted in the Act of July 12, 1960, Pub. L. No. 86-632, § 1, 74 Stat. 467 (1960), because the provision in the prior law allowing inactive duty trainees 30 days to report for work was "unrealistic." S. Rep. No. 1672, 86th Cong., 2d Sess. *reprinted in* 1960 U.S. Code Cong. & Admin. News 3077, 3078. For reasons not shown in the bill or its history, this provision covers "active duty for training" and "inactive duty training." The rationale for the amendment appears applicable only to leaves of short duration. As stated *supra*, at note 15, this provision would produce harsh and unreasonable results if extended to three-year leaves. The provision remains in the law and it lends credence to the construction that Congress never intended § 2024(d) to apply to leaves beyond three months in duration.

[37]The Senate Report illustrates the types of activity protected by the enactment, including those engaged in by persons "ordered to duty as instructors at rifle ranges," "attending 48 drills each year and . . . participat[ing] in active duty for training at least 15 days each year," "participat[ing] in summer camps and maneuvers," "attend[ing] schools conducted by the Regular Army and . . . participat[ing] in small arms competitions," "attending service schools, such as the Command and General Staff School, and to receive pilot training." S. Rep. No. 1672, 86th Cong. 2d Sess. (1960) *reprinted in* 1960 U.S. Code Cong & Admin. News 3077, 3079. These examples plainly establish the scope and the duration of the law.

4. *No action by Congress indicates that the protection afforded under § 2024(d) was expanded by the 1980 amendment to § 2024(f) that requires active duty for training under 32 U.S.C. 502(f).*

The Solicitor contends[38] that a 1980 amendment to 38 U.S.C. Section 2024(f)[39] adding duty under 32 U.S.C. § 502 to the definition of "active duty for training" was an expansion of protection afforded under § 2024(d), and that this indicates Congress's intent that § 2024(d) apply to extended leave requests.[40]

King was ordered to full-time duty (State) in Active Guard/Reserve status by the Governor of the State of Alabama pursuant to 32 U.S.C. § 502(f). Section 502(f) provides in pertinent parts:

> (f) Under regulations to be prescribed by the Secretary of the Army or Secretary of the Air Force, as the case may be, a member of the National Guard may
>
> (1) without his consent, but with the pay and allowance provided by law; or
>
> (2) with his consent, either with or without pay and allowance;

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[38]Brief of Petitioner at 33-35.

[39]Veterans Rehabilitation And Education Amendments of 1980, Pub. L. No. 96-466, § 511, 94 Stat. 2171, 2207 (1980); H.R. Rep. No. 498, 96th Cong., 1st Sess. 49 (1979).

[40]Amended § 2024(f) reads as follows:

> (f) For the purposes of subsections (c) and (d) of this section, full-time training or other full-time duty performed by a member of the National Guard under section 316, 502, 503, 504, or 505 of Title 32 is considered active duty for training. For the purposes of subsection (d) of this section, inactive duty training performed by that member under section 502 of Title 32 or section 206, 301, 309, 402, or 1002 of Title 37 is considered inactive duty training.

> be ordered to perform *training or other duty* in addition to that prescribed under subsection (a). Duty without pay shall be considered for all purposes as if it were duty with pay.

32 U.S.C. § 502(f) (emphasis added). The Solicitor asserts that the term "other duty" encompasses King's leave request and that by amending § 2024(f) to make § 502(f)'s "duty" active duty for training, Congress "deliberately extended the benefits of Section 2024(d) to Reservists serving in the AGR program." Brief of Petitioner at 33.

With due deference to the Solicitor, the argument that Congress amended subsection 2024(f) to "deliberately" expand § 2024(d) benefits to those serving pursuant to the AGR program is simply not the case. Section 2024(d) draws no distinction between the leave of absence rights afforded those engaged in "active duty training" and "inactive duty training." Both categories receive identical employment rights under § 2024(d).[41]

The 1980 amendment can only be explained on the basis that all of the activity under § 502 does not necessarily involve "training."[42] The same is true of the activities under §§ 503-505. The full-time service under those sections became "active duty for training" simply because Congress in § 2024(f) stated that such activity would be deemed "active duty for training" for purposes of subsections (c) and (d). Without this expression, activity under §§ 503-505 that did

[41]The House Report relied upon by the Solicitor evidences Congress's desire to provide "the same reemployment rights" to persons performing "full-time training or duty" under 32 U.S.C. § 502 "as current law provides following duty under Section 503-505 . . . ." H.R. Rep. No. 498, 96th Cong., 1st Sess. 49 (1979).

[42]When § 2024(d) was originally enacted in 1960, *see supra* notes 29, 30 and accompanying text, summer encampments under § 502 were described as "active duty for training." S. Rep. No. 1672, 86th Cong., 2d Sess. *reprinted in* 1960 U.S. Code Cong. & Admin. News 3077, 3079.

not involve "training" would not be reached by subsections (c) and (d). Persons engaging in such would not be protected by § 2021 or § 2024(a) or (b).[43] To provide them employment protection, despite their full-time service and despite the fact that they were not involved in "training," Congress simply included them into the category of "active duty for training" pursuant to § 2024(f). These persons were not given rights beyond the activity included by § 502, but were given the same rights as those under §§ 503-505.[44] It seems clear that Congress, realizing that some activity under § 502 was full-time, added § 502 to the top part of § 2024(f). Without this inclusion, like those similarly situated persons under §§ 503-505, persons engaged in activity other than for training would not be protected.

The inclusion of § 502 in § 2024(f) is not an inclusion of only § 502(f) to the exclusion of § 502(a)(1) and (2). On its face, then, and in accordance with the House Report,[45] § 502 includes components of full-time "training or other duty." Unfortunately, the term "full-time" is not defined, either in the original version of § 9(g)(5) of the Universal Military Training and Service Act[46] which later became § 2024(f), or in the amended version. Section 9(g)(5) also uses the words "full-time training or other full-time duty"[47] which also appear in the 1980 amendment of § 2024(f). These words encompassed those attending summer camps with the

[43]These persons are not inductees (38 U.S.C. § 2021(a)), they are not enlistees (38 U.S.C. § 2024(a)), they are not ordered or called to active duty (38 U.S.C. § 2024(b)), and they are not engaged in an "initial" period of active duty for training (38 U.S.C. § 2024(c)).

[44] H.R. Rep. No. 498, 96th Cong., 1st Sess. 49 (1979).

[45]*Id.*

[46]Act of July 12, 1960, Pub. L. No. 86-632, § 1, 74 Stat. 467 (1960); S. Rep. No. 1672, 86th Cong., 2d Sess., *reprinted in* 1960 U.S. Code Cong. & Admin. News 3077, 3078-79.

[47]*Id.*

Regular Army,[48] those attending schools conducted by the Regular Army and those who participate in small arms competitions, [49] and those who attend service schools and engage in pilot training.[50] Congress made no effort to define or redefine "training" or "other duty" when § 2024(f) was amended. Consequently, these provisions have no specific meaning outside the context of § 502 and, as with § 2024(d), their meaning and application is a matter of statutory construction.[51]

As demonstrated in § 502(f)'s legislative history, the purpose of the "training or other duty" language is to allow members of the National Guard who incur disability while they are performing training duty ancillary to the regularly scheduled drills or summer camps of their units, "hospital benefits, pay and allowances, or other compensation as would be received by a member of the Regular Army or the Regular Air Force if they were disabled in the line of duty."[52] Thus, in using these terms, Congress was not concerned with extended leaves or AGR tours. The explanation provided by the Senate for the amendment establishes that Congress was concerned with providing protection for members who incurred disability while performing additional training or duty collateral to their drills and camps.[53]

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[48]32 U.S.C. § 503.

[49]32 U.S.C. § 504.

[50]32 U.S.C. § 505.

[51]"Under the rule of *ejusdem generis*, where general words follow an enumeration of specific items, the general words are read as applying only to other items akin to those specifically enumerated." *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588 (1980). Applying this rule of statutory construction, the terms "training or other duty" are limited by the express enumerations in § 502(a)(1) -- drills -- and in § 502(a)(2) -- summer camps.

[52]S. Rep. No. 1584, 88th Cong., 2d Sess., *reprinted in* 1964 U.S.Code Cong. & Admin. News 3800, 3800.

[53] Members of the National Guard are frequently required to perform duties in addition to those performed by them at regularly scheduled drills. Examples are: (*a*) A battalion commander who might attend the drill at his unit headquarters on one night and then inspect the training of one of his batteries or companies at another drill period during the same week; (*b*) pilots of the National Guard are required to fly a minimum number of hours each year and cannot fly all their missions during scheduled drill periods; and (*c*) vehicle drivers and other specialists of a unit may be assembled for specialized training in a non-paid status after having drilled with their units earlier in the same week.

* * *

The committee amendment is not intended to encourage any additional training with pay; instead, its purpose is to make consistent the comparable provisions applicable to the Reserve and the National Guard.

* * *

The bill is not intended to provide additional pay for the training and duty that would be authorized, or to encourage any additional drill pay periods.

Id. at 3800-3802.

Thus, the "training or other duty" of § 502(f) was never intended "to encourage any additional drill pay periods"[54] much less encompass a three-year or longer extended tour of duty in the AGR program.[55]

5. *The 1982 Explanatory Statement of Compromise Agreement did not amend 38 U.S.C. § 2024(d).*

The Solicitor also claims that an Explanatory Statement of Compromise Agreement, 128 Cong. Rec. 25,513 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 3012,

[54]*Id.*

[55]When Congress made the 1984 definitional change in 32 U.S.C. § 101(19) (*see* Brief of Petitioner at 35, n. 26) relegating "full-time National Guard duty" to "active duty for training," Congress apparently realized that "active duty for training" was subordinated to "active duty" and protected under 10 U.S.C. § 265 or 10 U.S.C. § 672(d). It would have been a simple matter, if a substantive amendment to § 502(f) was intended, to either amend § 502(f) or to include AGR guard members under the protection of § 2024(b). Brief of Petitioner at 33, n. 25.

supports the position that leave rights under § 2024(d) are unlimited. Brief of Petitioner at 32, n. 24. The Solicitor, however, does not properly characterize the Explanatory Statement, and makes no effort to show the context leading to the Explanatory Statement. The Explanatory Statement refers to "the 90-day limit," 1982 U.S. Code Cong. & Admin. News at 3020, not to "durational limits" contended by the Solicitor. *Id.* The Explanatory Statement goes on to refer to "the 90-day limit" as "this arbitrary limitation." 1982 U.S. Code Cong. & Admin. News at 3020.

The Explanatory Statement expressly did not address the reemployment rights issue included in H.R. 6788, 97th Cong., 2d Sess., ___ Cong. Rec. ___ (1982).

The circumstances preceding H.R. 6788 began on May 11, 1981, when the Office of Veterans' Reemployment Rights ("OVRR") sought advice on the reemployment status of persons engaged in AG/R and ADS programs, expressing the view that neither category had any relationship to the reserve training referred to in §§ 2024(c) (it was not "initial"), 2024(d) (it was not "training"), or 2024(f) (it was not "training").[56]

The advise memorandum sought to find protection under the law for those engaged in these programs and suggested § 2024(b)(2) as a possible source.[57] The Associate Solicitor of Labor's reply to OVRR is dated October 8, 1981, and it leaves no doubt that the legislative history of § 2024(d), reviewed above, contemplates leaves of less than three months.[58] The Associate Solicitor's opinion reviews and cites H.R. Rep. No. 1263, 86th Cong., 2d Sess. 7 (1960) and S. Rep. No. 1070, 87th Cong., 1st Sess. 2, *reprinted in* 1961

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[56]H.R. Rep. No. 782, 97th Cong., 2d Sess. 3-4 (1982).
[57]*Id.*
[58]*Id.* at 5.

U.S. Code Cong. & Admin. News 3319, 3320. He advised "legislation to amend the Act would be necessary."[59] Within the next month following the Associate Solicitor's letter, the OVRR's director issued an interpretation that, *inter alia*, placed AGR personnel under § 2024(b)(1) and (2) and thus within the scope of the full coverage provided in § 2021.[60] His interpretation also states that § 2024(d) covered active duty or inactive duty for training of 90 days or less and recommended legislative amendment if longer periods were desired.[61] As recommended, the House then passed H.R. 6788, which included an amendment to § 2024(d) that would afford protection

> for a total of [not] more than 365 days (excluding required weekend drills and required annual two-week training periods) within any 36-month period."[62]

The House passed H.R. 6788 on September 14, 1982,[63] but it was never enacted by Congress.

Based on the above "history," including a failed or aborted bill, the OVRR made another handbook entry to the effect that § 2024(d) contained no limit on "number, frequency, or duration of the training duty periods." Brief of Petitioner at 32, n. 24.

There have been no substantive amendments to § 2024(d) since 1960.

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[59]*Id.* at 6.
[60]*Id.* at 7.
[61]*Id.* at 8.
[62]*Id.* at 13.
[63]Explanatory Statement, 1982 U.S. Code Cong. & Admin. News 3012, 3020.

6. *The scope and duration of employment rights under 38 U.S.C. § 2024(d) has not been delegated to the military.*

Since 1940, on many occasions, Congress has amended the employment protection statutes to correspond with needed change.[64] It has not delegated this task to the military. The express will of Congress in subsequent legislation is required before a prior statute's purpose can be completely transformed. This is not a job for the courts, but is entrusted exclusively to the legislative branch.

The contention that the courts are free to expand the coverage of 38 U.S.C. § 2024(d) beyond the scope intended by Congress, bounded only by the imagination of the military in devising new categories of duty,[65] is clearly without merit. As noted by this Court, the duty of the judiciary is to construe, rather than rewrite legislation. *United States v. Rutherford*, 442 U.S. 544, 555 (1979).

In construing the legislation at issue here, it is the intent of the Congress that wrote and passed the legislation that must control:

> The question here, as in any problem of statutory construction, is the intention of the *enacting body*.

United States v. N.E. Rosenblum Truck Lines, 315 U.S. 50, 53, (1942) (emphasis added). The "enacting body" of the statutory provision that was to become 38 U.S.C. § 2024(d)

[64]Selective Service Act of 1948, Pub. L. No. 80-759, ch. 625 § 9, 62 Stat. 614, __, (1948); Universal Military Training and Service Act, Pub. L. No. 82-51, ch. 144 § 1(s), 65 Stat. 86, ___(1951); Act of July 9, 1956, Pub. L. No. 84-665, § 1, 70 Stat. 509 (1956); Act of July 12, 1960, Pub. L. No. 86-632, § 1, 74 Stat. 467 (1960); Act of October 4, 1961, Pub. L. No. 87-391, § 75 Stat. 821 (1961); Act of August 17, 1968, Pub. L. No. 90-491, § 1, 82 Stat. 790 (1968); Vietnam Era Veterans' Readjustment Assistance Act of 1974, Pub. L. No. 93-508, ch. 43 §§ 2021-2026, 88 Stat. 1578, ___- ___(1974); Veterans' Rehabilitation and Education Amendments of 1980, Pub. L. No. 966-466, § 511, 94 Stat. 2171, ___. (1980).

[65]Brief of Petitioner at 30-32.

was the 86th Congress,[66] and it is the purpose of that Congress that the law must effectuate,[67] even if the literal wording of the statute does not make that purpose plain:

> Where the plain meaning of words used in a statute produces an unreasonable result "plainly at variance with the policy of the legislation as a whole," we may follow the purpose of the statute rather than the literal words.

Id, at 55.

In accord are the words of this Court found in *Nordone v. United States*, 308 U.S. 338, 340, (1939):

> Meaning must be given to what Congress has written, even if not in explicit language, so as to effectuate the policy which Congress has formulated.

Expansion of the coverage of a statute to embrace a class of persons, the membership of which is to be determined solely by the military arm of the executive branch of the government, amounts to a judicial reassignment of the legislative function to the executive branch, a result surely not contemplated or permitted under the Constitution.

Viewed in this light, the Explanatory Statement appears to be nothing *more* than a rejection of the 90-day arbitrary limitation[68]advanced by the OVRR, and the 1980 amendment to § 2024(f) nothing *more* than a recognition that there is/was an element of full-time duty under 32 U.S.C. § 502(f).

[66]*See supra* notes 29, 30 and accompanying text.

[67]It is clear that the views of subsequent Congresses cannot override the unmistakable intent of the enacting one. *Teamsters v. United States*, 431 U.S. 324, 354, n. 39 (1977); *see also United States v. United Mineworkers of America*, 330 U.S. 258, 281-282 (1947).

[68]The "reasonableness standard," discussed *infra*, has never included "the 90-day arbitrary limitations" as a basis to deny leaves of absences to National Guard members.

II. THE REASONABLENESS TEST IS APPROPRIATE AND THE COURT OF APPEALS APPROPRIATELY APPLIED IT TO DENY KING A THREE-YEAR LEAVE OF ABSENCE UNDER 38 U.S.C. § 2024(d)

A. *The reasonableness standard or test is an interpretative aid to find and fulfill the intent of Congress while protecting important rights of employees under 38 U.S.C. § 2024(d).*

The Solicitor attacks the "reasonableness" test enunciated in *St. Vincent's Hospital v. King*, 902 F.2d 1068 (11th Cir. 1990); *Eidukonis v. Southeastern Pa. Transp. Auth.*, 873 F.2d 688 (3d Cir. 1989); *Gulf States Paper Corp. v. Ingram*, 811 F.2d 1464 (11th Cir. 1987) and *Lee v. City of Pensacola*, 634 F.2d 886 (5th Cir. 1981) on the basis that it "frustrates the statutory purpose," Brief of Petitioner at 20; that it places in jeopardy those serving under the AGR Program and others who take or may want to take "lengthy" leaves, Brief of Petitioner at 25; that it threatens the ability of the National Guard to fill "pivotal positions requiring lengthy tours of 'active duty for training,'" *Id.*; and that it is an "unpredictable" creature of the judiciary," *Id.*

Some of these challenges are correct and some are statements of speculation with no resort to the record or to reality. King testified he would have accepted the military assignment even in the absence of employment rights protection. Thus, on this record, it is speculation to suggest that the decision below and others like it jeopardized the AGR Program.

There is an element of "unpredictability" when a reasonableness test is used in this context or in any other context. It would be easier if the statute clearly enumerated the leave limits, if any, or stated that the only qualifier, as suggested by the Solicitor, was to have "properly issued bona fide military orders." Brief of Petitioner at 37. That the statute does not go

that far is evident. It does not advance the cause to shout "judicial encroachment" when, in fact, the judiciary has diligently protected the rights of National Guard members. Without the reasonableness test, which is unsatisfactory to most employers, a reading of the history and purpose of the enactment would lead directly to a strict but short limit on leaves of absences. Employers generally would be more than willing to accept that decision.

Unlike the Eleventh Circuit's finding, the legislative history is not "self-contradictory," *St. Vincent's Hospital v. King*, 901 F.2d 1068, 1072 (11th Cir. 1990). One need not look beyond this Court's opinion in *Monroe v. Standard Oil Co.*, 452 U.S. 549 (1981) and the memoranda between the OVRR and the Department of Labor, H.R. Rep. No. 782, 97th Cong., 2d Sess. 3-10 (1982), to conclude that § 2024(d) protects employees on military assignments of less than three months. Also, the plain words in the statute and the placement of § 2024(d) in context with other provisions of the law reveals that short-term leaves are the only kind protected by § 2024(d). If the contrary is true, to read into the statute authority for leaves of three years and beyond would be unreasonable.

It is unreasonable, at least based on 1960 conditions, to conclude that Congress provided greater leave requests to National Guard members serving in their State Capitols than it provided inductees or enlistees or reservists called or ordered to duty.[69] Likewise, the idea of a three-year leave of

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[69]Contrary to the Solicitor's suggestion, the protection granted to "volunteers for regular military service," Brief of Petitioner at 39, is *not* "without any qualifications." *Id.* The coverage afforded to these persons is contingent on changed "employer's circumstances" which may render it "impossible or unreasonable" to reemploy the person. In addition, the person is not guaranteed the same job he or she left, but only a "like position." Further, this reinstatement is only required if the person is "still qualified." 38 U.S.C. § 2021(a)(B).

absence is absurd based upon employment standards in either 1960 or today. It is also unreasonable to expect a National Guard person to return to work on the first day after a three-year leave expires.

From the Hospital's point of view, it *was* necessary and reasonable to hire and train a replacement for King, its only Manager of Protective Services. Under the Solicitor's view, such a replacement would necessarily have to be temporary since King is entitled to reclaim his precise job upon conclusion of his three-year term of National Guard service, assuming the leave is not extended. It is difficult to attract a qualified temporary replacement under these circumstances. Also, King would almost certainly have to be retrained upon his return three years hence. Under the Solicitor's view, the Hospital would not be afforded the option of returning King to his job only if he were then "qualified," or even of finding him a comparable position, but would be forced to return him to his previous position regardless of his qualification. Three years or more is a long time to maintain satisfactory skill levels, especially where the job involves matters of high technology or compliance with government regulations and programs.

It is true that § 2024(d) does not contain an express reasonableness standard. To that extent, the reasonableness standard is a judicial doctrine. More importantly, however, it is an interpretive aid designed to find and fulfill the intent of Congress, not to override it.

As stated in *Sorrells v. United States*, 287 U.S. 435, 450 (1932):

> "The Congress by legislation can always, if it desires, alter the effect of judicial construction of statutes. We conceive it to be our duty to construe the statutes here in question reasonably . . . "

General words, like those found in 38 U.S.C. § 2024(d) and (f) and in 32 U.S.C. § 502(f), are to be limited by construction "to those objects to which the legislature intended to apply them," *United States v. Palmer*, 3 Wheat. 610, 631, 16 U.S. 610, 631, 4 L. Ed. 471 (1818) (Marshall, C. J.), and "It will always . . . be presumed that the legislature intended exceptions to its language" where necessary to avoid "an absurd consequence." *United States v. Kirby*, 7 Wall 482, 486-487, 74 U.S. 482, 486-487, 19 L. Ed. 278 (1868).[70]

As applied to this case, it is evident that § 2024(d) does not expressly impose number, frequency, or duration limitations.[71] The "general words" in § 2024(d) such as "active duty for training" and "training and other duty" in 32 U.S.C. § 502(f) are to be tempered by construction to avoid unreasonable consequences and in a manner that saves, not destroys, the purpose of the statute. But despite clear sanction as an interpretative aid, the Courts of Appeals have not been consistent in describing the so-called reasonableness test. The guiding principle in those cases where reasonableness has been applied has been "the admonition to liberally construe reemployment rights statutes in favor of those who serve their country."[72]

The first appellate court to apply the reasonableness standard to a leave request under § 2024(d) was the United States

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[70]Accord, *United States v. Katz*, 271 U.S. 354, 362 (1926); *Ozawa v. United States*, 260 U.S. 128, 194 (1922) citing *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892); *Watt v. Alaska*, 451 U.S. 259 (1981).

[71]Except by its reference from § 2024(f) which incorporates 32 U.S.C. § 502 and other Title 32 sections and provisions.

[72]*Gulf States Paper Corp. v. Ingram*, 811 F.2d 1464, 1468 (11th Cir. 1987) (citing *Monroe v. Standard Oil Co.*, 452 U.S. 549, 574 (1981) (Burger, C. J. dissenting); *Coffey v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946)). *Eidukonis v. Southeastern Pa. Transp. Auth.*, 873 F.2d 688, 695 (3rd Cir. 1989) (citing *Coffey*, 447 U.S. at 196).

Court of Appeals for the Fifth Circuit in *Lee v. City of Pensacola*, 634 F.2d 886 (5th Cir. 1981). Lee, a police officer and Captain in the Florida National Guard, requested and was granted a leave of absence by the City of Pensacola for approximately two months to attend the National Guard Transportation Officer Advance Course. After beginning the course, Lee requested an additional leave of absence for approximately five more months to complete the entire training program. His latter request was denied by the City. When he failed to return to work, his employment was terminated. Even though *Lee* is the first case and the leading case, both parties therein agreed that a "rule of reason" was to be read into § 2024(d). *Id.* at 888-89.

The Fifth Circuit found that "under the circumstances of this case . . . Lee's conduct[73] did not meet the rule of reasonableness that he acknowledges as binding in such a situation." *Id.* at 890. The City did not argue that leaves under § 2024(d) were limited to short periods of time lasting less than ninety days. The "rule of reasonableness" developed because both parties to the *Lee* case agreed that a request under § 2024(d) had to be "reasonable under the circumstances."

The Eleventh Circuit adopted the reasonableness standard in *Gulf States Paper Corp. v. Ingram*, 811 F.2d 1464 (11th Cir. 1987), and set out the appropriate factors to be considered in reviewing § 2024(d) leave requests, finding a one-year leave request reasonable. The employee, a medic with the Army Reserve, sought a leave to participate in a licensed practical nurse training program. Reversing the trial court, the Eleventh Circuit found that although § 2024(d)

[73]Lee was granted a seven-week leave to attend a training course. He then negotiated with the military authorities a five-month extension and without timely informing his employer of the negotiations, sought an extension of his original leave one week before he was expected to return.

> does not address the "reasonableness" of a reservist's leave request, the Fifth Circuit added a "reasonableness" gloss to section 2024(d)'s requirements. *Lee*, 634 F.2d at 889. Thus, under *Lee*, a reservist's request must be reasonable to qualify for the protections of the Veteran's Reemployment Rights Act. . . . Therefore, we must explain the *Lee* inquiry to identify legitimate factors for courts to consider.

Id. at 1468. The Eleventh Circuit found that protection under § 2024(d) depended upon the length of the leave request[74], the conduct of the employee in requesting the leave, and the burden placed upon the employer as a consequence of the employee's temporary absence. *Id.* The court determined that leave requests are presumed reasonable, that the weightiest factor in overcoming the presumption is the conduct of the employee, and that burden to the employer is not enough to make the leave request unreasonable. *Id.* at 1469. Nevertheless, in finding that the one-year leave request was not unreasonable, the Eleventh Circuit concluded that "[w]e agree that although one-year is not *per se* unreasonable, a greater length of time might reach that level." *Id.*

The Third Circuit in *Eidukonis v. Southeastern Pa. Transp. Auth.*, 873 F.2d 688 (3d Cir. 1989) adopted a "totality of the circumstances" reasonableness standard in reviewing leave requests under § 2024(d), rejecting the "three factors" test established in *Gulf States*. *Eidukonis*, 873 F.2d at 695-96. In *Eidukonis*, the employer refused to extend a leave of absence for an additional 26-day period. The plaintiff failed to report to work at the expiration of his unextended leave, and was

[74]*See, e.g., St. Vincent's Hospital v. King*, 901 F.2d 1068, 1071 (11th Cir. 1990) ("The opinion [in *Gulf States*] does not indicate that the United States took its current position that the language of Section 2024(d) could not be interpreted as requiring a showing of reasonableness.")

dismissed.[75] Apparently, *Eidukonis* was the first case in which the issue of whether or not a reasonableness standard applied to leave requests under § 2024(d) was raised by any party. *Id.* at 692. Eidukonis argued that it was inappropriate to apply a reasonableness standard to a reservist's military leave and that he had an absolute right under § 2024(d) to take military leave of any duration, subject only to a bad faith standard.[76]

While Eidukonis argued that no reasonableness test applied to his leave request, the employer did not argue that leave requests under § 2024(d) were limited to leaves of 90 days or less.[77] The court did note, however, that Eidukonis could point "to nothing in the legislative history of Section 2024(d) to indicate that Congress contemplated that it was authorizing reservists to take leaves of unlimited duration for reserve service." *Id.* at 693. The Third Circuit observed that although "[t]he military may view an employee's right under Section 2024(d) to be unlimited, . . . [this] is not our position." *Id.* at 696. Relying on *Gulf States* and *Lee*, the Third Circuit recognized that the right of employees to take military leave on request under § 2024(d) embodies an implicit requirement that the request for leave be reasonable. *Id.* at 694.

In the present case, the Solicitor also questioned the application of a reasonableness standard to employee leave requests under § 2024(d).[78] The district court rejected this argument and adopted the Eleventh Circuit's pronouncement in *Gulf States* that a leave request longer than one year might reach the level of being *per se* unreasonable. Relying on its earlier decision in *Gulf States* and on the Third Circuit's decision in *Eidukonis*, the Eleventh Circuit affirmed, holding that application of a reasonableness standard to a § 2024(d) leave request was necessary in order to prevent an absurd, unjust, or unintended result. The Court concluded:

> We hold, especially in light of the Supreme Court's statement in *Monroe* that this section of the statute was passed "to deal with problems faced by employees who had military training obligations lasting less than three months," *Monroe*, 452 U.S. at 555, 101 S.Ct. at 2514, and in view of the self-contradictory legislative history of the section, that it is appropriate for this Court to determine a definite limit beyond which any leave would be unreasonable.
>
> No case has been called to our attention in which a leave of absence of as long as three years has been held protected under Section 2024(d). We, therefore, agree with the trial court that a three year leave of absence is *per se* unreasonable.

St. Vincent's, 901 F.2d at 1072.[79]

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[75]Had the last extension been granted, Eidukonis would have served 220 straight days on military assignments, less one week of paid vacation and only one week of work. *See Eidukonis*, 873 F.2d at 690-92.

[76] As the Third Circuit recognized: "[i]f the right to take leave would be subject only to a bad faith limitation, it would in effect be unlimited in duration." *Eidukonis*, 873 F.2d at 694.

[77]*Eidukonis*, 873 F.2d at 693 ("We do not suggest that section 2024(d) is by its terms inapplicable to reservists who take more than 90-day leaves, an argument that has not been made by SEPTA.").

[78]"Unlike the unsuccessful employee in *Lee* and the successful employee in *Gulf States*, the United States takes the position in this case, that 'the plain' language of 38 U.S.C. § 2024(d) does not place any limitations on the duration of a leave of absence protected by the Act." *St. Vincent's*, 901 F.2d at 1070.

[79]The *St. Vincent's* Court also found that "even if we should find that the trial court erred in finding a three year leave *per se* unreasonable, we would nevertheless hold that on the facts of this case, considering the factors outlined in *Gulf States*, the judgment of the trial court should be affirmed." 901 F.2d at 1072.

The Fourth Circuit in *Kolkhorst v. Tilghman*, 897 F.2d 1282 (4th Cir. 1990), *petition for cert. filed*, No. 89-1949, found that the Baltimore Police Department's actions in establishing a quota for reservists violated the nondiscrimination provisions of § 2021(b)(3). With regards to § 2024(d), the court opined, "We do not believe that reasonableness is required under Section 2024(d)" . . . and "the reasonableness standards that have been imposed by other courts are contrary to the purpose of Section 2024(d) to allow reservists to train with their military units without suffering prejudice or any adverse action from their employers." *Id.* at 1286.

B. *King's request of St. Vincent's for a three-year leave of absence to serve as State Command Sergeant Major of the Alabama National Guard is unreasonable.*

Although § 2024(d) does not state the period of time for which an employee may obtain a leave of absence to attend training as a reservist or National Guard person, such leave requests necessarily must have some limit. As discussed *supra*, the language, legislative history and purpose of § 2024(d) indicate that Congress contemplated at most leaves of short duration lasting only 30, 60 or 90 days. *Monroe*, 452 U.S. at 554-55; *Eidukonis*, 873 F.2d at 693; *Gulf States*, 811 F.2d at 1469.

Employees within the ambit of § 2024(d) are supposedly part-time soldiers and full-time civilian employees. To allow National Guard members greater rights than inductees, enlistees, and those called or ordered to duty would clearly frustrate the intent of Congress in working a compromise between the obligations of a part-time soldier to his government and a full-time employee to his civilian employer.

A three-year leave of absence for the Protective Service Manager would place a difficult burden on St. Vincent's.

R1-39. The Protective Service Manager is an important position that is unique within the Hospital. No other employee has the same responsibilities as the Protective Service Manager. The uncertainty created by a temporary replacement in such a sensitive position prevents the Hospital from efficiently protecting the safety and welfare of its patients and employees. Moreover, the interim manager cannot be effective in implementing changes or new policies or programs because of the temporary nature of his position.

Under the facts of this case, the Eleventh Circuit was correct in placing a durational limit on § 2024(d) leave requests. The role of the judiciary is to implement the will of Congress. It is clear that the Eleventh Circuit has applied the reasonableness test in favor of the employee even where the duration of the request exceeded the statutory mandate. *Gulf States*. Its opinion below, however, finds that there are clear limits beyond which it will not go in striking a reasonable balance. While one year may find some support in the legislation, three years is simply too much to ask.

In arguing that King's request was reasonable, the Solicitor does not purport to follow the judicially approved path of finding exception to the general phraseology in § 2024(d), a path that avoids harsh results while promoting the purpose of the legislation. Instead, the Solicitor urges the Court to perform the legislative function of moving AGR leaves from "active duty for training" to the broader protections found in § 2024(a)(B). While the director of OVRR is apparently free to issue handbook interpretations based on which way the political wind is blowing at the time, H.R. Rep. No. 782, 97th Cong. 2d Sess. 6-10 (1982), the Court should follow the spirit and the will of the legislation and leave legislative matters to the Congress.

C. *Professional military decisions should be left to the military, but those decisions must be subordinate to the will of the legislature.*

The Solicitor is seeking too much in the claim that the "courts should not question the reasonableness of the length . . . for training, so long as the leave is supported by properly issued bona fide military orders." Brief of Petitioner at 37. Such a claim is tantamount to saying that this Court should ignore the legislative branch of government. The legislature has provided rights to National Guard persons and others, but in so doing, the legislature did not abrogate its legislative function to the military.

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit Court of Appeals is due to be affirmed.

Respectfully submitted,

HARRY L. HOPKINS
Attorney for Respondent

May, 1991

No. 90-889

In the Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM "SKY" KING, PETITIONER

v.

ST. VINCENT'S HOSPITAL

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondent concedes that the operative statutory provision—38 U.S.C. 2024(d)—neither "state[s] the period of time for which an employee may obtain a leave of absence to attend training as a reservist or National Guard person," Br. 36, nor "expressly impose[s] number, frequency, or duration limitations." *Id.* at 31. As a result, respondent effectively concedes the textual weakness of its interpretation. Undaunted, respondent nonetheless insists that a durational limit must be read into the provision to "avoid unreasonable consequences." *Ibid.* We disagree. Applying Section 2024(d) as Congress wrote it does not make the statute unworkable or lead to a result that is irrational or contrary to Congress's intent. To the contrary, it faithfully implements Congress's intent.

1. a. Respondent focuses on the differences between reemployment rights provided under Section 2024(d) to Reservists performing "active duty for training" and the protections afforded to Reservists, and others, who serve tours of "active duty" that are comparable in length to the three-year tour petitioner served in the Active Guard Reserve (AGR) Program.[1] Respondent notes that Section 2024(d) guarantees a "leave of absence" (which means that the Reservist maintains his status as an employee) and the right to return to precisely the same job previously occupied (Br. 4), rather than the right to "reemployment" in the same or a similar job, which is available under Section 2024(a) and (b) to Reservists and others who complete a multi-year tour of active duty.[2] Persons returning from active duty are allowed 90 days to apply for reemployment under Section 2024(a) and (b), whereas, under Section 2024(d), Reservists

[1] Respondent erroneously states (Br. 9 n.13, 10 n.15) that Section 2024(d) is the reemployment rights provision that applies to Reservists serving "periods of active duty up to five years" under 10 U.S.C. 679(a). In fact, that Section is rarely invoked as authority to call a Reservist into active duty. In any event, a Reservist called under that Section would be covered under 38 U.S.C. 2024(b), not Section 2024(d) of the Veterans' Reemployment Rights Act. The longest tour of duty that currently falls within the scope of Section 2024(d) is the three-year tour of full-time duty required by the AGR Program in which petitioner was enrolled.

[2] Section 2024(a) and (b) provide that enlistees, Reservists, or others who voluntarily or involuntarily enter on active duty enjoy reemployment rights on the same terms as inductees. The reemployment rights of those inducted into the Armed Forces are governed by 38 U.S.C. 2021(a) and (b), which is reprinted at App., *infra*, 1a-3a. See also 38 U.S.C. 2024(c) (reemployment rights following initial active duty training as provided for inductees).

returning from active duty for training must report to their pre-service jobs "at the beginning of the next regularly scheduled working period" following their return to the place of employment after release from service. Respondent suggests that the requirements of Section 2024(d) are ill-suited to lengthy periods of absence; if Congress had intended Section 2024(d) to confer reemployment right for extended periods, respondent maintains, it would have set forth rights and responsibilities similar to those provided under Section 2024(a) and (b). Resp. Br. 11-16.

None of the features of Section 2024(d) noted by respondent are incompatible with its application to any of the tours of duty that fall within the scope of the provision. It is neither unheard of nor impossible for an employee to take a leave of absence lasting years. Nor is there any apparent obstacle to an individual travelling back to his previous place of employment at the end of a prolonged leave and reporting to his job the next day.[3]

The fact that Congress chose to grant persons serving multi-year tours of active duty a longer period to return to civilian employment does not produce any inconsistency. Congress could reasonably have concluded that a shorter period was appropriate because *most* Reservists required to serve active duty for

[3] Respondent notes, Br. 18 n.36, that, in enacting Section 2024(d) in 1960, Congress eliminated a provision in the prior law allowing trainees 30 days to report to work, explaining that "[a] period of 30 days within which to assert leave of absence rights by persons performing * * * training such as an armory drill of 2 hours is unrealistic." However, from the fact that Congress thought it unnecessary to allow an extensive interval to return to work from a training session that lasts only hours, it does not follow that a short interval is unworkable or unreasonable following a lengthy period of leave.

training are not away from their jobs for more than two weeks. As noted in our opening brief, at 30-31, Section 2024(d) was incorporated into the Veterans' Reemployment Rights Act (VRRA) at a time when the training obligations of Reservists were brief and intermittent. Even today, the great majority of Reservists invoking the protections of Section 2024(d) are away from their jobs for short, required training periods of one weekend per month and two weeks per year, Gov't Br. 31, and relatively few Reservists participate in the tours covered by Section 2024(d) that require more substantial time commitments. See Gov't Br. 23 n.18, 24-25 n.19. But even though Section 2024(d) may have been primarily intended to cover short training tours, and incorporates features geared to the typical case, that does not bar application of the provision to the broad range of cases covered by the statute's language. As this Court has recently stated, Congress is entitled to legislate for a class with particular examples in mind. See *Board of Governors* v. *Dimension Fin. Corp.*, 474 U.S. 361, 371 (1986). Although Section 2024(d) may be aimed at the most common training tours, it applies to the exceptional case as well.[4]

[4] In any event, the different periods provided for return to civilian employment may be justified on the basis of the nature of the duty itself. For example, Congress may have decided that a return to civilian life following most of the training encompassed by Section 2024(d) would tend to be less difficult than the return to ordinary life after three months of initial active training duty (which involves intensive training that includes preparation for combat) (see 38 U.S.C. 2024(c) (31 days to apply for reemployment)), or after several years of active duty in the Armed Forces (which could involve prolonged exposure to combat or other stressful conditions). Respondent seeks to second-guess these judgments by superimposing "reasonableness" limitations on Section 2024(d) that are not present in the statute.

Also in contrast with Section 2024(a)-(c), Section 2024(d) does not provide post-return job protection from discharge "without cause." See Resp. Br. 14. This difference could likewise be based on a congressional judgment that such protection was not needed for brief training tours. It does not follow from the decision not to provide this protection, however, that application of Section 2024(d) to longer training tours is inconsistent with the statutory language, or that it contravenes Congress's design. There is no compelling reason why this class of Reservists must be provided post-return job protection on the same terms as classes covered by other subsections, especially since Congress could justifiably have decided that other groups of employees needed more protection.

b. Respondent contrasts Section 2024(d)'s command—that an employee performing active duty for training be returned to his previous position—with the requirement in 38 U.S.C. 2021(a)(B), which applies under Section 2024(a) and (b) to those who serve active duty tours, that a returning employee be granted a position only if "still qualified" to perform his job. Br. 13. Respondent likewise observes that although Section 2021(a)(B) relieves the employer of the obligation to rehire the employee if circumstances "have so changed as to make it impossible or unreasonable" to comply, Section 2024(d) contains no such explicit qualification. See Resp. Br. 11 n.17. Respondent claims, Br. 13, that the failure to include these express provisos (which are addressed to eventualities likely to occur during long periods of absence) shows that Section 2024(d) was intended to apply only to leaves of short duration.

Respondent's contention is without force because the explicit limitations placed on the employer's obligations by Section 2021(a) do not differ significantly

from those implicit in Section 2024(d). This Court has recognized that the laws protecting veterans' reemployment rights are not designed to provide members of the Armed Forces with advantages over fellow workers, but rather to insure that those who serve their country will "not[] be penalized on [their] return by reason of [their] absence," and will be returned to "the precise point [they] would have occupied had [they] kept [their] position continuously" during the period of duty. *Fishgold* v. *Sullivan Drydock & Repair*, 328 U.S. 275, 284-285 (1946); see also *Siaskiewicz* v. *General Electric Co.*, 166 F.2d 463, 466 (2d Cir. 1948) ("Discrimination in favor of veterans is as foreign to the purposes of the [reemployment rights laws] as discrimination against them."); *Monroe* v. *Standard Oil Co.*, 452 U.S. 549, 561 (1981) (Reservists are entitled "to the same treatment afforded their co-workers not having * * * military obligations"). In accord with those principles, Section 2024(d) by its terms makes clear that it is *not* designed to make the Reservist better off than he would have been had he stayed on the job: by providing that a Reservist on training duty shall be returned to the status he "would have had" if he had "not been absent for such purposes," the provision makes clear that it does not mandate his "return" to a job that was eliminated during his absence. Compare 38 U.S.C. 2021(b)(2) (same language for inductees).

In this respect, the employer's duties under Section 2024(d) are virtually the same as under Section 2021(a)(B), since the exception for when "the employer's circumstances have so changed as to make it impossible or unreasonable" to comply with the latter provision, see Resp. Br. 29 n.69, is limited "only [to instances] where reinstatement would require

creation of a useless job or where there has been a reduction in the work force that would reasonably have included the veteran." *Davis* v. *Halifax Cty. Sch. Sys.*, 508 F. Supp. 966, 968 (E.D.N.C. 1981); see also *Cason* v. *Emanuel County Board of Educ.*, 101 L.R.R.M. 2045, 2046-2047 (S.D. Ga. 1979); *Jennings* v. *Illinois Office of Educ.*, 97 L.R.R.M. 3027, 3029-3030 (S.D. Ill. 1978), aff'd, 589 F.2d 935 (7th Cir.), cert. denied, 441 U.S. 967 (1979); *Schaller* v. *Board of Educ.*, 449 F. Supp. 30, 33 (N.D. Ohio 1978). See also *Davis* v. *Halifax Cty. Sch. Sys.*, 508 F. Supp. at 968 (the commands of Section 2021(a)(B) apply with full force even if all eligible positions are filled at the time of reappointment); *Kay* v. *General Cable Corp.*, 144 F.2d 653, 655 (3d Cir. 1944) (same); *Witter* v. *Pennsylvania National Guard*, 462 F. Supp. 299, 305 (E.D. Pa. 1978) (same). Like Section 2021(a)(B) (see also Section 2021(b)(2)), Section 2024(d) does not require an employer to create a useless job; nor does it mandate a Reservist's reinstatement to a position that would have been eliminated whether or not the Reservist had elected to take a leave of absence.[5]

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[5] The "changed circumstances" proviso in Section 2021(a)(B) cannot be compared with the amorphous, multi-factor "reasonableness" test that the courts have created under Section 2024(d). The former applies only in exceptional and well-defined situations, and its application is guided by the well-established principle that the employee is to be restored to a position as favorable (but no more favorable) than the one he would have occupied had he not left his job, even if such restoration requires great sacrifice by the employer. In contrast, the "reasonableness" tests that have been applied by the courts to leaves under Section 2024(d) involve a far-ranging assessment of the employer's convenience and inter-

Likewise, although Section 2024(d) does not address Reservists' rights to return to positions for which they are no longer qualified (other than as the result of a service-related disability), there is nothing in Section 2024(d) that requires employers to retain Reservists not capable of performing their jobs.[6] In sum, it is of no significance that Section 2024(d) does not contain language identical to that in Section 2021(a)(B) expressly "address[ing] the obligations the employer would owe an employee whose position has been abolished or redefined." Resp. Br. 13. Since Section 2024(d) implicitly fixes the

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ests as well as the Reservist's conduct and motives, and allow broad judicial discretion to balance the multiplicity of factors.

In addition, the Section 2021(a)(B) proviso, unlike the reasonableness test, is assessed as of the time the Reservist or veteran returns from duty, when the employer's "changed circumstances" can be known with specificity and certainty. Under Section 2024(d), the reasonableness of the leave is evaluated as of the time of the request, when the impact of the Reservist's leave on the employer is often no more than a matter of speculation.

[6] In this regard, Reservists completing active duty for training under Section 2024(d) enjoy the same degree of protection as Reservists returning from initial active duty training (Section 2024(c)) or active duty (Section 2024(b)). The latter provisions, in contrast with Section 2024(d), bar the discharge of employees "without cause" within six months or one year after reemployment following the completion of service. See Resp. Br. 14. In no case, however, would an employer be barred from discharging an unqualified employee under *any* of these provisions (since such a discharge would be "for cause"), as long as the discharge does not result from the imposition of unreasonable or arbitrary employment standards. See, *e.g.*, *William F. Congrove* v. *St. Louis-San Francisco R.R.*, 89 Lab. Cas. (CCH) ¶ 12,347, at 25,798-25,799 (W.D. Mo. 1980); *Taylor* v. *Southern Pacific Co.*, 308 F. Supp. 606, 609 (N.D. Cal. 1969).

employer's obligations and the Reservist's rights in such cases, the absence from Section 2024(d) of explicit language directed to those contingencies does not render Section 2024(d) incapable of application to prolonged tours of duty.

2. Respondent complains that the government's interpretation of Section 2024(d) "does not fall within [the] hierarchical scheme of protection afforded by the law." Br. 17. Respondent suggests that Congress placed Reservists serving active duty for training under Section 2024(d) "at the bottom of the employment rights scheme," Br. 16, and that it is therefore "impossible to believe that Congress intended to grant greater rights" to those involved in "active duty for training" than to "inductees, enlistees, and those called or ordered to duty." Br. 15-17, 36.

By purporting to discern within the VRRA a lexical ordering of categories of service and reemployment protections, respondent superimposes an artificial hierarchy without support in the statute. Respondent creates this ordering only by setting to one side the very clear *absence* of a durational limit in Section 2024(d), which it claims is out of keeping with the ordering it constructs.[7] Contrary to respondent's contentions, the VRRA scheme does not admit of a simple ranking of the varying protections afforded by its provisions. Rather, the features of the different VRRA provisions—including durational limits or the absence thereof—reflect an allocation of benefits and

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[7] The fact that a returning Reservist is entitled under Section 2024(d) to the *same* job he previously occupied, rather than, at the employer's election, to the same or a similar job as provided under Section 2021(a) and Section 2024(a)-(c)), also belies respondent's suggestion that Reservists that fall within the reach of Section 2024(d) are "at the bottom of the employment rights scheme."

burdens tailored to the needs and demands of different types of service. By seeking to circumscribe the rights clearly conferred under Section 2024(d) in order to conform with an artificial hierarchy, respondent disturbs the balance Congress has struck in each instance "between benefits to employee-reservists and costs to employers." *Monroe* v *Standard Oil Co.*, 452 U.S. 549, 565 (1981).[8]

3. a. Respondent's attempt (Resp. Br. 19-23) to undercut the government's reliance on the 1980 amendment to 38 U.S.C. 2024(f)—which provided that members of the National Guard performing full-time duty under 32 U.S.C. 502 would receive reemployment protection under Section 2024(d), see Gov't Br. 910 & n.11, 33-35—boils down to the contention that "full time duty under Section 502" does not include full time duty in the AGR Program. Respondent maintains, Br. 23, that the term "other duty" in 32 U.S.C. 502(f), see Gov't Br. App. 1a,

[8] More specifically, there is no foundation for respondent's assertion that interpreting Section 2024(d) to impose no fixed durational limit fails to fit in with the scheme of *durational* limits established under other sections. While Congress imposed durational limits under Section 2024(a)-(c), it did not impose durational limits in some other provisions of the VRRA. Congress may have decided there was no need to establish an explicit durational limit in Section 2021 for involuntary inductees (since it is unlikely personnel in that category would serve longer than necessary); in Section 2024(d) for active duty trainees (since training programs generally have inherent limits and a fixed duration, see Gov't Br. 37 n.27); and in Section 2024(e) for preinduction examinations (which are quite short). In contrast, many of the individuals covered under Section 2024(a) and (b) are volunteers who might choose to prolong their military service indefinitely. Congress may have decided to protect employers from the obligation to reemploy those members of the Armed Forces who were most likely to serve multiple tours of duty.

was "never intended * * * [to] encompass a three-year or longer extended tour of duty in the AGR program." In attempting to justify this contention, respondent bypasses the language of Section 502(f), which refers in unqualified terms to "training or other duty" and contains nothing that would prevent the inclusion of full-time AGR duty within the category of "other duty." Respondent also ignores the longstanding practice of the National Guard of the United States which, since 1980, has issued orders to serve in the AGR program under Section 502(f). See Gov't Br. 8, 33-35 n.25.

Respondent attempts to justify its thesis solely by reliance on a remark in the Senate Report, Br. 22 & n.53, that Section 502(f) was "not intended * * * to encourage any additional drill pay periods" or "any additional training with pay." See S. Rep. No. 1584, 88th Cong., 2d Sess. 2-3 (1964). Regardless of what the authors of that remark intended to "encourage," the comments do not bear the weight respondent places on them, which is, in effect, to invalidate 32 U.S.C. 502(f) as a source of authority for calling members of the National Guard to serve in the AGR Program, in contravention of longstanding practice and the plain terms of the provision.[9]

Even assuming, *arguendo*, that respondent's characterization of the scope of Section 502(f) was valid

[9] Respondent's attempt to invoke the principle of *ejusdem generis*, Br. 22 & n.51, to support its narrow view of the reach of Section 502(f) is also to no avail. Although other subsections of 32 U.S.C. 502 make reference to specific types of duty, those subsections are clearly not intended as an enumeration of the term "other duty" in Section 502(f), which was added to the statute after those subsections were enacted in order to provide authority for training activity not already covered by other parts of Section 502.

when Section 502(f) was enacted, respondent's description was no longer correct by the time Section 2024(f) was amended in 1980. In the first in a series of yearly enactments authorizing and appropriating funds for the AGR program, Congress specifically provided that members of the National Guard in the AGR program could be ordered to "serv[e] on active duty under * * * section 502(f) of title 32, United States Code." See Gov't Br. 34 n.25 (citing the Department of Defense Appropriation Act of 1980). National Guard members in the AGR have received their orders under that provision ever since. Thus, the phrase "other duty" in Section 502(f) unquestionably encompasses full-time duty in the Active Guard Reserve Program.

b. In the course of discussing the 1980 amendment to Section 2024(f), respondent at one point appears to argue (Br. 20-21) that Congress's decision in 1980 to define "training or other full time duty" authorized under 32 U.S.C. 502(f) as "active duty for training" within the meaning of Section 2024(d) may have effected an expansion of the *category* of personnel covered under Section 2024(d) to include National Guard members in the AGR program. However, respondent contends that the 1980 amendment in no way enlarged the *duration* of leave protected under that Section.

We do not disagree. Before the 1980 amendment to Section 2024(f), there was some question as to whether full time support personnel in the AGR program (who do not receive training) were covered by Section 2024(d), since it applies to "active duty for training." [10] The amendment to Section 2024(f)

[10] However, at the time Section 2024(d) was added in 1960, the definitional section of Title 38 stated that "active duty for training" included, "in the case of members of the Army National Guard or Air National Guard of any State, full-time duty under section * * * 502 * * * of title 32." 38 U.S.C. 101(22)(C). See Pub. L. No. 85-857, Sept. 2, 1958, 72 Stat. 1108. Thus, it appears that, prior to 1980, 38 U.S.C. 2024(d) applied to full-time personnel called under 32 U.S.C. 502, whether or not in training. In any event, Congress mandated that result through the 1980 amendment by specifying in the text of Section 2024(f) that "full-time duty performed by a member of the National Guard under section * * * 502 * * * is considered active duty for training for purposes of Section 2024(d)." 38 U.S.C. 2024(f).

made clear that the protections of Section 2024(d) applied to all personnel serving full-time under Section 502(f), including AGR personnel. However, the 1980 amendment in no way altered the meaning of Section 2024(d) as originally enacted with regard to the *duration* of coverage available under that Section. As it stood before Section 2024(f) was amended to cover AGR personnel, the plain terms of Section 2024(d) contained no durational limit and would have afforded comprehensive protection to any Reservist engaged in a bona fide tour of *training duty* for the full length of that tour. The 1980 amendment simply deemed AGR duty to be a form of "active duty for training" covered by Section 2024(d); it did not increase the length of leaves of absence protected under that Section.[11]

[11] Respondent errs in claiming (Br. 23-25) that the government relies on after-enacted legislative history in the form of an Explanatory Statement of Compromise Agreement, 128 Cong. Rec. 25,513 (1982), to support the position that Section 2024(d) imposes no arbitrary durational limit. Rather, the government adduced the Explanatory Statement in the course of noting that the government's position is identical to the position to which the Department of Labor has adhered since 1970, except for the two-year period when it followed the

Although it was not necessary for Congress to amend Section 2024(d) to increase the *duration* of its protections, Congress's decision to extend the coverage of Section 2024(d) to AGR personnel provides powerful support for the conclusion that Section 2024(d) does not, and never did, impose arbitrary time limits on the rights it provided. It would have made no sense for Congress to extend reemployment benefits under Section 2024(d) to Reservists serving tours known to require a three-year commitment if that Section only protects reemployment rights for shorter periods. Congress surely would not have taken the futile step of bringing a reserve program within the reach of a reemployment rights provision that offers the participants no reemployment protection.[12]

Respondent's interpretation of the statute, in contrast to our reading of the pertinent provision, leaves AGR support personnel—such as petitioner—with no reemployment rights. Petitioner is covered by Section 2024(d), not by any other reemployment rights provision, by virtue of the fact that he was called into service under 32 U.S.C. 502, and Section 2024(f) provides that service under 32 U.S.C. 502 constitutes active duty for training under Section 2024(d). For administrative reasons, the Army requires AGR personnel serving full-time tours of duty to serve for at least three years. Gov't Br. 8. Yet respondent contends that this Court should adopt a *per se* rule that a request for a three year leave of absence is unreasonable and hence unprotected under Section 2024(d). Congress did not intend that result. Thus, contrary to the court of appeals' invocation of *Church of the Holy Trinity* v. *United States*, 143 U.S. 457 (1892), Pet. App. 11a, a literal construction of the statute does not produce an absurd result. To the contrary, failing to protect AGR personnel like petitioner would undermine Congress's intent.

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JUNE 1991

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decision in *Lee* v. *City of Pensacola*, 634 F.2d 886 (5th Cir. 1981). See Gov't Br. 32-33 n.24.

[12] For the same reason, even if Section 2024(d) as originally enacted did not guarantee reemployment following multi-year periods of active duty for training, the 1980 amendment to Section 2024(f) had the effect of extending the coverage of Section 2024(d) to AGR personnel for the full duration of their service. Gov't Br. 35. Section 2024(d) states that a leave shall be granted "for the period required to perform active duty for training." Since AGR personnel are required to serve for three years, it follows that the 1980 amendment to Section 2024(f), by extending the protections of Section 2024(d) to AGR personnel "for the period required" to complete their tours, could be construed to expand not only the scope but also the duration of protection for service in that program.

APPENDIX

§ 2021. Right to reemployment of inducted persons; benefits protected

(a) In the case of any person who is inducted into the Armed Forces of the United States under the Military Selective Service Act (or under any prior or subsequent corresponding law) for training and service and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service, and (1) receives a certificate described in section 9(a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after such person is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its territories, or possessions, or political subdivisions thereof, or the District of Columbia, such person shall—

(i) if still qualified to perform the duties of such position, be restored to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position, by reason of disability sustained during such service, but qualified to perform the duties of any other position in the employ of the employer, be offered employment and, if such person so requests, be employed in such other position the duties of which such person is qualified to perform

as will provide such person like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such person's case;

(B) if such position was in the employ of a State, or political subdivision thereof, or a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or the employer's successor in interest to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service, but qualified to perform the duties of any other position in the employ of such employer or the employer's successor in interest, be offered employment and, if such person so requests, be employed by such employer or the employer's successor in interest in such other position the duties of which such person is qualified to perform as will provide such person like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such person's case,

unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so. Nothing in this chapter shall excuse noncompliance with any statute or ordinance of a State or political subdivision thereof establishing greater or additional rights or protections than the rights and protections established pursuant to this chapter.

(b)(1) Any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section shall be considered as having been on furlough or leave of absence during such person's period of training and service in the Armed Forces, shall be so restored or reemployed without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration or reemployment.

(2) It is hereby declared to be the sense of the Congress that any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section should be so restored or reemployed in such manner as to give such person such status in the person's employment as the person would have enjoyed if such person had continued in such employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment, or reemployment.

(3) Any person who seeks or holds a position described in clause (A) or (B) of subsection (a) of this section shall not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

(c) The rights granted by subsections (a) and (b) of this section to persons who left the employ of a

State or political subdivision thereof and were inducted into the Armed Forces shall not diminish any rights such persons may have pursuant to any statute or ordinance of such State or political subdivision establishing greater or additional rights or protections.

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No. 90-889

In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM "SKY" KING, PETITIONER

v.

ST. VINCENT'S HOSPITAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MOTION OF THE PETITIONER FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ARGUMENT AND SUPPLEMENTAL BRIEF FOR THE PETITIONER

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MOTION OF THE PETITIONER FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ARGUMENT

Pursuant to Rules 25.5 and 25.6 of the Rules of this Court, the Solicitor General, on behalf of petitioner William "Sky" King, respectfully moves for leave to file the attached supplemental brief. At oral argument in this case, counsel for petitioner was asked whether Section 2024(c) of the Veterans' Reemployment Rights Act, 38 U.S.C. 2024(c), provides petitioner with reemployment protection for his service in the Alabama National Guard as a member of the Active Guard Reserve (AGR) Program. That issue had not been addressed in the courts below or in the parties' briefs, since the parties

and the lower courts agreed (see Pet. App. 18a n.8; 5a-6a) that Section 2024(d) applies in this case.

Since this issue has not been briefed, we bring to the Court's attention the statutory and regulatory basis for counsel's response, which was that petitioner's tour of duty in the AGR Program does not qualify as an "initial period of active duty for training" entitled to protection under Section 2024(c). We believe that these materials will aid the Court in its consideration of the question whether Section 2024(c) applies to the type of duty performed by petitioner.

For the foregoing reasons, it is respectfully submitted that the motion for leave to file the attached supplemental brief after argument should be granted.

KENNETH W. STARR
Solicitor General
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SUPPLEMENTAL BRIEF FOR THE PETITIONER

At oral argument in this case, counsel for petitioner was asked whether Section 2024(c) of the Veterans' Reemployment Rights Act, 38 U.S.C. 2024(c), provides petitioner with reemployment protection for his service in the Alabama National Guard as a member of the Active Guard Reserve (AGR) Program. The purpose of this supplemental brief is to bring to the Court's attention the statutory and regulatory basis for counsel's response, which was that petitioner's tour of duty in the AGR Program does not qualify as an "initial period of active duty for training" entitled to protection under Section 2024(c).

The statutes and regulations show that the "initial period of active duty for training" referred to in Section 2024(c) is a mandatory, one-time tour of "basic training" that is required of newly enlisted Reservists without prior military experience. The statutory requirement for such initial training is set forth in 10 U.S.C. 511(d), which authorizes enlistment in the Reserve components (including the Army National Guard), and provides that "a non-prior-service person * * * shall perform an initial period of active duty for training of not less than twelve weeks to commence insofar as practicable within 270 days after the date of * * * enlistment."* In short, the "initial period of active duty for training" covered by Section 2024(c) is the "initial period of active duty for training" referred to in Section 511(d).

Petitioner's three-year tour of full-time service in the Active Guard Reserve was not "an initial period of active duty for training." Petitioner first enlisted in the Alabama National Guard 38 years ago; when he left his work at respondent hospital in 1987, he was

* Regulations promulgated under Section 511(d) provide that the period of "initial" training must be performed "with minimum practicable delay after enlistment," 32 C.F.R. 132.3(d), and that new Reservists are to be enrolled "only to the extent that initial active-duty-for-training spaces are expected to be available within 180 days from the dates of enlistment." *Id.* at 132.3(a). The regulations further state that "advanced individual training in specific military skills" is available to members of the Reserve components only upon "completion of their basic training." *Id.* at 132.3(h). Finally, "in order to assure uniformity of training and discipline," the regulations require members of the Army and Air National Guard to perform basic training as "Reserves of the Army or of the Air Force, as appropriate." *Id.* at 132.3(g). That is, they must serve in federal status, not, as did petitioner here, in state status. See Pet. Br. 34-35 & nn.25, 26.

not a new recruit engaged in a mandatory tour of basic training on the authority of 10 U.S.C. 511(d). Rather, he was a long-time member of the Alabama National Guard performing optional service under an entirely different provision, 32 U.S.C. 502(f), for the purpose of "organizing, administering, recruiting, instructing [and] training" the state National Guard units. Petitioner's full-time support duty in the National Guard is "active duty for training"—not an "initial period of active duty for training"—for purposes of Title 38. See 38 U.S.C. 101(22), 2024(f). Therefore, the reemployment rights provision that applies in petitioner's case is Section 2024(d), not Section 2024(c).

For the foregoing reasons, and the reasons stated in our brief on the merits, the judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

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